

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
APPENDIX**

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P/S

In The
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

75-2084

IN RE. MICHAEL SHERMAN

UNITED STATES OF AMERICA,

Petitioner-Appellee,

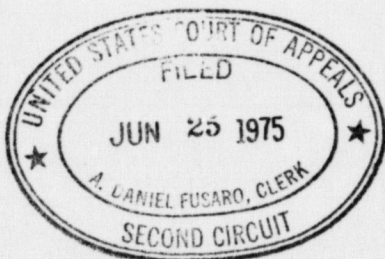
-against-

MICHAEL SHERMAN,

Respondent-Appellant.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE EASTERN
DISTRICT OF NEW YORK

APPELLANT'S APPENDIX



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PAGINATION AS IN ORIGINAL COPY

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DOCKET ENTRIES

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

vs.

75C 846

MICHAEL SHERMAN

<u>DATE</u>	<u>PROCEEDINGS</u>
5-30-75	BY PLATT, J. ORDER filed that MICHAEL SHERMAN is in direct contempt of this Court for failure to answer questions before Grand Jury, May, 1972, etc. (Order dated March 24, 1975) (1)
5-30-75	BY COSTANTINO, J. JUDGMENT FILED. Re: Bail, etc. Bail will be set at \$1000 pending the appeal if a notice of appeal is filed within the time required by the rules. (See judgment, etc.) (2)
5-30-75	NOTICE OF APPEAL FILED from Judgment entered on May 27, 1975. Proof of Service endorsed thereon. (3)
5-30-75	Copy of Notice of Appeal was on this day mailed to Clerk, U.S.C.A.
5-30-75	Forms C and D together with instructions re preparation of record on appeal, were on this day handed to Theodore S. Weiss, Esq., eec.
6-3-75	NOTICE OF APPEAL FILED (MICHAEL SHERMAN, from Judgment entered on June 2, 1975) (4)
6-4-75	Copy mailed to Hon. David Trager, U.S. Atty., and to Federal Strike Force, 35 Tillary St., Brooklyn, N.Y.
6-4-75	Copy mailed to Clerk, U.S.C.A.

DOCKET ENTRIES

<u>DATE</u>	<u>PROCEEDINGS</u>	
6-11-75	MINUTES OF HEARING FILED dated March 24, 1975.	(5)
6-16-75	All documents in this matter were on this day transmitted to Clerk, U.S.C.A.	
6-16-75	Minutes of Stenographer filed (dated April 28, 1975)	(6)
6-17-75	Respondent's Memorandum of Law filed in opposition, etc.	(7)
6-17-75	BY COSTANTINO, J. ORDER FILED that Michael Sherman is in direct contempt of Court, etc.	(8)
6-17-75	Minutes of Stenographer filed (dated March 17, 1975)	(9)
6-17-75	Affidavit of Michael Sherman filed and Request for Affirmation or Denial of Electronic Surveillance.	(10)
6-17-75	MEMORANDUM filed (Michael Sherman, etc.)	(11)
6-17-75	BY FUSARO, CLERK, U.S.C.A. Copy of order filed re filing of brief by the U.S., etc.	(12)
6-18-75	MINUTES OF STENOGRAPHER FILED (Dated May 14, 1975)	(13)
6-18-75	Copy of Index filed with endorsement thereon re documents received by Clerk, U.S.C.A.	(14)

STATEMENT RE GRAND JURY MINUTES

At the request of the Government, the District Court (Costantino, D.J.) directed that the transcripts of Grand Jury minutes be forwarded to the Circuit Court under seal (72a infra). It is understood by appellant, that the Court's direction has been followed.

1 UNITED STATES DISTRICT COURT
2 EASTERN DISTRICT OF NEW YORK
3 -----X

4 IN THE MATTER :

5 -of- :

6 GRAND JURY TESTIMONY OF :
7 MICHAEL SHERMAN :
8 -----X

9 United States Courthouse
10 Brooklyn, New York

11 April 28th, 1975

12
13 B e f o r e :

14 HONORABLE EDWARD R. NEAHER, U.S.D.J.
15
16
17
18
19
20

21 DANIEL D. SIMON
22 OFFICIAL COURT REPORTER
23
24
25

Appearances:

2

DAVID G. TRAGER, ESQ.,
United States Attorney
for the Eastern District of New York

BY: DAVID RITCHIE, ESQ.,
Assistant United States Attorney

1 (Courtroom cleared.)

2 MR. RITCHIE: Your Honor, this concerns --
3 the caption is Miscellaneous Matter, in re Grand
4 Jury testimony of Michael Sherman.

5 Mr. Sherman was before this Court last Monday,
6 although your HONor didn't get a chance to hear it
7 because of other business you had, for appointment
8 of counsel.

9 THE COURT: Oh, yes.

10 MR. RITCHIE: As I informed you last week
11 Mr. Sherman had previously been represented by
12 retained counsel last -- ten days ago Friday.

13 THE COURT: Didn't we arrange to get somebody
14 for him.

15 MR. RITCHIE: We had tentative arrangements
16 for Mr. Kelly. Mr. Kelly was never appointed.
17 Mr. Sherman phoned me on Wednesday and informed me
18 that although he had just previously fired or ended
19 an arrangement with Mr. Thal, which was because of
20 lack of money, his parents had now retained another
21 attorney for him.

22 Now the other attorney is Theodore S. Weiss,
23 who your HONor may know is a City Councilman. He is
24 an attorney practicing in Lower Manhattan.

25 And I learned that Mr. Weiss was representing

1 Mr. Sherman I immediately called Mr. Weiss to tell
2 him that the Grand Jury had delayed enough and he
3 would have to be here.

4 Mr. Weiss stated he wouldn't be able to be here.
5 And I told him, "Well, I'm going to produce Mr. Sherman
6 and have him answer questions anyway."

7 On Friday Mr. Weiss again called and said he
8 couldn't be here and asked me for the name of my
9 superior, to speak with my superior. He never phoned
10 my superior.

11 I have an affidavit which I will submit to
12 the Court. It is my affidavit. It was notarized
13 this morning. I will submit the original and a copy.
14 I have a copy here for Mr. Sherman. It relates
15 certain matters that went on before the Grand Jury,
16 but Mr. Sherman was the witness and I believe there
17 is no problem on the --

18 THE COURT: I have two of these for some
19 reason. I guess perhaps one of these --

20 MR. RITCHIE: One is a copy for the Court,
21 your Honor.

22 THE COURT: And one is the original.

23 MR. RITCHIE: Yes, your HOnor.

24 THE COURT: To be filed.

25 MR. RITCHIE: I have a copy for Mr. Sherman.

1 THE COURT: Where do we file these things?
2 WE don't file Grand Jury papers.

3 MR. RITCHIE: Well, it is for your Honor's
4 perusal.

5 THE COURT: Well, I have the copy.

6 MR. RITCHIE: I will turn over a copy to
7 Mr. Sherman, your Honor?

8 THE COURT: Well, that's up to you.

9 MR. RITCHIE: Well, it is matters that were
10 before the Grand Jury. It relates -- there might be
11 a secrecy question.

12 THE COURT: The Grand Jury, of course, as you
13 know, is entirely a secret proceeding and normally
14 we don't make reference or put matters of this kind
15 in circulation. That is what I am concerned about.

16 MR. RITCHIE: I realize that, your Honor, but --

17 THE COURT: I am perfectly willing to hear
18 what you say here but I think you had better hang on
19 to it.

20 MR. RITCHIE: Well, your HONor, what the
21 affidavit set forth is what has gone on before. I
22 believe I can probably summarize it for your Honor
23 somewhat quicker.

24 The affidavit relates that Mr. Sherman, who
25 is a sentenced prisoner at the Allenwood Prison Farm,

1 he had pleaded guilty to two counts in indictment No.
2 73-CR-1068, which was the Superfecta trial, as it is
3 more commonly known.

4 On January 30th I submitted a writ. Judge
5 Dooling signed it for production on February 17th.
6 February 17th was a holiday.

7 On February 24th, Mr. Sherman appeared before
8 the Special May, 1972 Grand Jury, Grand Jury which is
9 going to expire on Sunday.

10 At that time he refused to answer questions
11 because his counsel was not present. That was on
12 February 24th.

13 Prior to that time I had spoken with Mr. Sherman'
14 then counsel, Mr. Youtt. He stated that Mr. Sherman
15 would be glad to answer questions but he didn't
16 believe the United States wanted the answers because
17 the United States would be embarrassed by the answers
18 to the questions.

19 Nevertheless the United States did ask him
20 questions.

21 He refused to answer because counsel was not
22 present.

23 The next week, March 3rd, Mr. Sherman again
24 appeared before the Grand Jury. At that time he
25 asserted his Fifth Amendment privilege.

1 I had had a conversation with Mr. Youtt in
2 which Mr. Youtt and I agreed rather than seek a
3 formal grant of immunity, Mr. Youtt would direct his
4 client to answer questions on an understanding from
5 the United States that Mr. Sherman would not be
6 prosecuted.

7 Well, on March 3rd, at any rate, he asserted
8 his Fifth Amendment privilege and Mr. Youtt insisted
9 on a formal grant of immunity.

10 On March 17th, St. Patrick's Day, pursuant
11 to authorization from the Department I had applied
12 for and received an order compelling testimony under
13 a grant of immunity from Judge Thomas Platt, the
14 then Miscellaneous Judge.

15 On the 17th Mr. Sherman appeared and refused
16 to answer questions because counsel was not present.

17 He was directed to answer questions by Judge
18 Platt.

19 Judge Platt got hold of Mr. Youtt's partner,
20 Mr. Saul. Mr. Sherman at that time did not want to
21 answer all the questions because of the fact that he
22 didn't have his attorney present.

23 So On March 24th he again appeared before the
24 Grand Jury and took a civil contempt under 2A US Code
25 1826.

1 On April 11th I informed Mr. Sherman that he
2 would again be called in front of the Grand Jury.

3 The Grand Jury he was called in front of the
4 next time on April 18th -- which was on April 21st,
5 which was last Monday -- was the special May, 1974
6 Grand Jury rather than the Special May 1972 Grand
7 Jury.

8 I had phoned Mr. Sherman's counsel three days
9 before his appearance and told him to appear.

10 Mr. Sherman's counsel stated that he would be
11 no longer representing Mr. Sherman because of money
12 questions.

13 On the 21st I applied before your Honor for
14 appointment of legal aid.

15 On March 23rd -- On April 23rd Mr. Sherman
16 informed me that he had retained Mr. Weiss. That
17 is where we stand today.

18 At the present time I am seeking an order
19 from your Honor to have Mr. Sherman answer questions
20 put to him.

21 There has been one question put to him so far
22 that he has refused to answer. And that question is
23 -- I can have it set forth by the stenographer.

24 THE COURT: All right, let's have the young
25 lady read it.

1 MR. RITCHIE: Can you read the question
2 directing your attention to March 20th.

3 THE COURT: Do I understand that this Grand
4 Jury is the May, 1974 Grand Jury?

5 MR. RITCHIE: We are now talking about the
6 Special May, 1974.

7 He had previously appeared before the Special
8 May, 1972 Grand Jury.

9 THE COURT: This Grand JURY is not about to
10 expire.

11 MR. RITCHIE: No, of the Special May, 1972 Grand
12 Jury before which he appeared four times and on which
13 he is presently under sentence of civil contempt.

14 THE COURT: I see.

15 MR. RITCHIE: Six months or the life of the
16 Grand Jury, whichever is shorter, and that will
17 expire Sunday.

18 THE COURT: But he is serving at Allenwood
19 under that contempt -- for that contempt or because
20 of some other criminal offense.

21 MR. RITCHIE: He is presently at West Street,
22 your HOnor, on the civil contempt. He was, I believe,
23 improvidently released from Allenwood on April 9th,
24 which when he was first up for parole -- or would have
25 been just up for parole except for the civil contempt.

1 I will have to straighten that out with the Prison
2 Board. I do not believe that he was entitled to be
3 paroled because he was not doing any good time after
4 he took the civil contempt citation on March 24th.
5 I will have to settle that out with the Bureau of
6 Prisons.

7 THE COURT: Now what's the question.

8 THE COURT REPORTER: "Mr. Sherman, directing
9 your attention to March 20th, 1973, did you have
10 occasion to speak with Mr. Marvin Proman in connection
11 with a Superfecta race that evening at Roosevelt
12 Raceway?

13 "Answer: I refuse to answer on the grounds that
14 my counsel isn't here."

15 Mr. Ritchie, I believe that was the only question
16 of any substance that was asked.

17 There were a number of other questions asked
18 concerning who his counsel was, when he was retained,
19 but they aren't very material to the Grand Jury inquiry.
20 They were elicited just to establish a frame of
21 reference your HONOR.

22 THE COURT: What was the date of that refusal?

23 MR. RITCHIE: This was today your Honor.

24 THE COURT: This was today?

25 MR. RITCHIE: I have the intention of asking him

1 other questions if he is ordered to answer this
2 question too, your Honor.

3 The ground he is presently asserting is the
4 absence of counsel to assist him.

5 In the normal situation I would be glad to give
6 an adjournment, but as your Honor can see this has
7 recurred repeatedly. And for those reasons I would
8 ask to have the witness directed to answer.

9 If it comes to a contempt that would be
10 different question.

11 THE COURT: Now the immunity that has been
12 granted, was that granted by Judge Dooling.

13 MR. RITCHIE: No, Judge Platt, your Honor, on
14 March 17th.

15 THE COURT: Now, Mr. Sherman, your position is
16 that you want to be able to consult with your attorney?

17 MR. SHERMAN: Excuse me. He said if it came
18 to this under the possibility that it would, he left
19 a number where you might be able to reach him. It
20 was conceivable he might be through with his prior
21 commitment.

22 THE COURT: Well, is it possible -- I have heard
23 the question so I guess the young lady can be excused.

24 MR. RITCHIE: Thank you your Honor.

25 THE COURT: Is it possible to reach Mr. Weiss

1 before we go any further on this. You can come back
2 here at 2:00 o'clock.

3 MR. RITCHIE: Your Honor, I had attempted to
4 contact Mr. Weiss at the number that was left. At
5 the number I was originally given for him his Worth
6 2-2800, which I believe is his private law practice.
7 I was given the number 566-5288 which is apparently
8 Councilman Weiss' office. It is either his official
9 phone or perhaps an unofficial office that he maintains.
10 I attempted to call the 566-5288 at 12:10 and again
11 at twenty of one. On both occasions the line was busy.
12 I phoned a number of times and there is something --

13 MR. SHERMAN: It is the same number (indicating).

14 MR. RITCHIE: Either it is busy constantly or
15 there is something wrong with the phone.

16 Is that the number that you have?

17 MR. SHERMAN: Yes, I was just showing you it,
18 566-5288. And then Worth 2-2800.

19 MR. RITCHIE: Okay. I attempted to reach him
20 but I wasn't able to reach him.

21 THE COURT: Well, when you finally did reach
22 Mr. Weiss did he tell you he had been retained?

23 MR. RITCHIE: Yes, your HONOR, on Wednesday he
24 informed me that he had been retained as counsel, and
25 he requested an adjournment beyond April 28th so that

1 he could familiarize himself with the law in this
2 matter and with the facts.

3 I stated I wouldn't grant such an adjournment
4 because of the amount of time that has already passed
5 in this matter. And it was five days from Wednesday
6 to Monday anyway, which I think is ample time to
7 research the law.

8 On Friday he phoned again and stated that,
9 well, he just couldn't make it today because something
10 had come up, and he had a City Council Meeting.

11 And I said, "Can you have a partner or another
12 member of your firm come?"

13 And he said that he couldn't because he was a
14 single practitioner.

15 I do believe that this witness has been granted
16 immunity. He has been granted a number of adjournments
17 because of the absence of counsel at different times.

18 I made a concession on March 17th when he was
19 being ordered by Judge Platt to answer questions that
20 he didn't have to answer certain questions if he wished
21 to consult with his attorney.

22 Now, I may have seemed a little hardnosed with
23 Mr. Weiss but, your Honor, I would like to say that
24 this has been going on for quite a while, and I have
25 granted repeated adjournments. And I think it is

1 about time that the Government and the Grand Jury
2 got some answers to its questions.

3 MR. SHERMAN: Is it all right if I say something
4 your HONor.

5 THE COURT: Yes.

6 MR. SHERMAN: I have very little control over
7 whether my attorney appears or doesn't appear. I
8 am incarcerated at the present time. It is not my
9 design that any of this has happened, Number one,
10 and, number two, what came up with Mr. Weiss was
11 something that came up on Friday. And if you try to
12 verify it you will find out that it was something that
13 he couldn't have known about on Wednesday or Thursday.
14 It was something new that happened on Friday. At least
15 that is the way he described it to me. It was just
16 something that came up at the last minute in
17 reference to a meeting of the City Council.

18 THE COURT: Well, the point is this, this Grand
19 Jury comes in how often.

20 MR. RITCHIE: Just once a week your HONor.

21 THE COURT: On Mondays?

22 MR. RITCHIE: Yes your HONor.

23 THE COURT: You say he is to be released on
24 Sunday, is that what you are telling me.

25 MR. RITCHIE: Yes, that's correct.

1 THE COURT: In view of the hour and everything
2 else I would like to have you try to mail Councilman
3 Weiss, or whatever, and make it plain to him that
4 the Court expects that he will make every effort to
5 slip over here this afternoon and be able to talk to
6 this witness. Leave that message with anyone who
7 answers. And I will be prepared to see him in Court
8 myself about this matter because it may be a simple
9 matter that can be simply resolved. But I do not
10 like to deny the witness before the Grand Jury who
11 requests an opportunity to consult with counsel that
12 opportunity. It is a right he has. Immunity or no
13 immunity I do not know exactly what immunity was
14 granted here.

15 MR. RITCHIE: It was a testimonial immunity
16 pursuant to 186002, 6003.

17 THE COURT: I don't know whether he knows what
18 that means. Has it been explained to him?

19 MR. RITCHIE: I have explained it to him at
20 least two or three times.

21 THE COURT: He may feel more confidence if he
22 gets it from a lawyer who agrees with you.

23 MR. RITCHIE: He had an attorney, Mr. Youtt,
24 and Mr. Youtt was supplied with a copy.

25 THE COURT: The only thing is this, I am assumin

1 that Mr. Youtt withdrew from this case for substantial
2 reasons. But what is going on here is not an attempt
3 to impede the Grand Jury investigation.

4 MR. SHERMAN: In no way, shape or manner. All
5 I can do is tell you that.

6 THE COURT: If you get Councilman Weiss to come
7 over here I will interrupt this trial to hear this
8 matter.

9 MR. RITCHIE: Yes your HONor.

10 THE COURT: But I do not think I want to do it
11 without your making contact with Weiss in view of the
12 statement you made here that he had asked -- he wanted
13 to go on the 28th --

14 MR. RITCHIE: Yes, your HONor.

15 THE COURT: But he knew he was supposed to be
16 here on the 28th, is that it?

17 MR. RITCHIE: Yes, your HONor.

18 THE COURT: You tell him I expect him to be here.

19 MR. RITCHIE: I don't know whether I made it
20 clear. I thought I had, your HONor. That was a
21 conversation I had with him Wednesday. On Friday,
22 after the preparation of this affidavit, I got another
23 call from Mr. Weiss and he stated he couldn't be here
24 today because of something that had come up in the
25 Council.

1 THE COURT: Well, find out whether the Council
2 can't spare his presence for 15 minutes to come over
3 here this afternoon. That is what I want him to do.

4 MR. RITCHIE: Yes sir. Thank you your HONor.

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - x
UNITED STATES OF AMERICA :
- against - :
MICHAEL SHERMAN, :
Defendant. :
- - - - - x

United States Courthouse
Brooklyn, New York

May 5, 1975

B e f o r e :

HONORABLE MARK A. COSTANTINO, U.S.D.J.

BURTON SULZER
OFFICIAL COURT REPORTER

Appearances:

DAVID G. TRAGER, ESQ.,
United States Attorney
for the Eastern District of New York

BY: DAVID RITCHIE, ESQ.,
Assistant U.S. Attorney

THEODORE S. WEISS, ESQ.,
Attorney for Defendant Sherman

MR. RITCHIE: Your Honor, this is Mr. Theodore Weiss. He is Michael Sherman's attorney. Michael Sherman has been a witness before two Grand Juries which I know Mr. Weiss at least thinks is a problem. He was called as a witness on January 31, 1975. Judge Dooling, who was then miscellaneous judge, issued a writ for the production of Mr. Sherman who was then an incarcerated prisoner at Allenwood as a result of his plea of guilty to the indictment 73CR1068, which was an Eastern District Indictment. It was the Superfecta case.

He had pleaded guilty. He had been sentenced to 18 months. He was incarcerated at Allenwood. He was called into the special May, 1972 Grand Jury, whose term expired on Sunday, to be questioned concerning an investigation which has been opened with the U.S. Attorney, File No. 741762.

He appeared on February 24, on March 3rd, on March 17th and on March 24th.

On March 17th, Judge Thomas Platt, who was then Miscellaneous Judge, signed an immunity grant pursuant to provisions of 18US Code 6002, 6003.

On March 24th, when Mr. Sherman refused to answer certain questions, he was adjudged in civil contempt and confined pursuant to the provisions of

28 US Code Section 1826. His incarceration on that civil contempt ended on the past Friday, I believe.

MR. WEISS: That's right.

MR. SHERMAN: That's when I was released.

MR. RITCHIE: He was released on Friday.

He was called before the special May, 74 Grand Jury, which has been investigated this particular investigation for the past nine months on, for the first time two weeks ago -- is that correct, two weeks ago?

MR. WEISS: Approximately.

MR. RITCHIE: At which time he did not have an attorney. He had fired his first attorney. In the period between two weeks ago and one week ago he retained Mr. Weiss. Mr. Weiss was unable to appear last Monday because of other engagements.

At that time he refused to answer certain questions, one particular question, he was brought in front of Judge Neaher. Judge Neaher stated that he would not proceed and order him to answer questions until his attorneys were here. His attorney is here today.

He was asked four questions by the Grand Jury that he refused to answer. Those four questions were:

No. 1, who paid the fees of his attorney. He stated that a friend paid his fees.

Who paid the fees for his attorney, Mr. Harry Yude, at the time of his involvement with the Superfecta case. He was also asked who paid the fees of Mr. Andrew Fisher, his attorney preceding Mr. Yude in the Superfecta case.

He was also asked, directing your attention to March 20th, 1974, on that day did you have occasion to speak with Marvin Proman concerning a Superfecta race in which Alan Kantor rode Hempstaed Champ? He was further asked: Did you tell Mr. Proman that you would give him a thousand dollars if Alan Kantor finished out of the top four in that Superfecta race?

All four questions he has refused to answer. All four questions he has been directed to answer by the Foreman of the Grand Jury and he continues to refuse to answer.

MR. WEISS: Your Honor, yesterday I had prepared a memorandum which I would appreciate, with your Honor's permission, handing up to your Honor and copy to Mr. Ritchie -- in essence, it is a chronological description detailing Mr. Sherman's involvement in this matter going back to the fact that since June 25th of 1974 he has been continuously incarcerated up to last Friday, with the exception of a portion of time on April 10th of this year when Allenwood mistakenly

released him because they did not have a record of a hold on him.

He immediately, when he came into the city, after advising Allenwood that they made a mistake, communicated with his then attorney who communicated with Mr. Ritchie, and by prearrangement came in the very next day and was then returned to the West Street Detention facility in Manhattan.

When he was arrested on June 25th he was in the process of turning himself into the authorities.

He had engaged an attorney for that purpose and had in fact received some monies which were to pay legal fees. When he went to pick up those monies is when he was apprehended.

I raise all of this, your Honor, because at the time that he was sentenced, prior to his being sentenced, it was indicated to him that he could by cooperation also be granted immunity before the Grand Jury, before he ever pleaded.

He chose to plead to both counts of the indictment and receive the sentence that Mr. Ritchie had eluded to. At the time of the sentence, His Honor Judge Judd, who imposed sentence, received a commitment from the US Attorney then handling the case that there would be no further interest in further prosecution of

Mr. Sherman, and so in that memorandum I suggest that perhaps it would be in the best interest of justice and be quite appropriate for your Honor to refer the matter to Judge Judd, in light of his earlier handling of the entire case, including Mr. Sherman's plea of guilty to both counts of the indictment.

Secondly, if your Honor please, I think that there is a very serious legal question at stake here, that is whether in fact an authorization and an order pursuant to that authorization granted directing Mr. Sherman to testify before a specific Grand Jury before which he was appearing last month, that is in March, which was specifically May, 1972 Grand Jury, in fact suffices as the order to direct him to testify before the May, 1974 Grand Jury.

I think that the statute, as I read it, if your Honor please, would require that in fact there be a request filed with Mr. Ritchie's superiors indicating the status of the situation, what changes, if any, have taken place since the original order was granted.

I should also indicate to your Honor that I think that there is a second and perhaps equally important question which I don't think has been adjudicated and that is, give the statutory restriction of, I think it is 1826, of the term of

sentence which can be imposed for civil contempt, to wit: The life of the proceeding, the life of the Grand Jurh, or 18 months back, whichever first occurred. He having been sentenced to a certain period and then the Grand Jury having expired, I question, a legal question, whether in fact it is appropriate to bring him before a Grand Jury.

I know that before the statute there were authorities indicating that it may be possible. Since the enactmant of that statute I think that it may be argued validly that the Legislature, the Congress intended a restriction on the amount of time that any defendant can be expected to serve and that time would be either 18 months or the life of the jury, or the life of th e proceedings, whichever first occurs.

MR. RITCHIE: With respect to Mr. Weiss' first point, which is that this matter belonged before Judge Judd, I would say that Mr. Weiss is incorrect on that. This is a miscellaneous matter which is properly before you and should remain before you.

With respect to his assertion that there was a promise made by the US Attorney at the time of acceptance of the plea, he is right so far as he goes. There was an agreement that Mr. Sherman would not be

prosecuted for a number of other crimes which were specified. The crimes were related to his unlawful flight to avoid prosecution, obstruction of justice and other such crimes connected with his flight at the time of indictment.

It is not the intention of the United States to prosecute him for them at all. The United States made that representation and it lives by it.

The United States did not say that by taking the plea Mr. Sherman could close inquiry forever with respect to why and how he flew and who aided and who assisted him in the flight.

I believe that there was -- it is the belief of the Government that there was a substantial obstruction of justice in that case that was not limited to Mr. Sherman alone, and it is the intent of the United States and of its Grand Jury to get to the bottom of that situation.

There were four witnesses who either recanted or fled during the course of that Superfecta trial. Three of the four witnesses asserted all sorts of pressure being put on them by US Attorneys; they also asserted the US Attorneys in the middle of the Grand Jury were giving signals to the recanting witnesses. I think that is highly incredible to begin with, but

at any rate, that is the claim. I think that there was an obstruction of justice and the United States would not have agreed to halt any further inquiry into the case.

With respect to Mr. Weiss' other claims, which are that there is a statutory maximum imposed under 1826, Mr. Weiss is quite correct, there is a statutory maximum. I think he has stated it aptly. Up to 18 months for the life of the Grand Jury, whichever comes first. He is not before that Grand Jury now, he is before another Grand Jury. He is being asked questions pertinent to an investigation. If he finds himself in civil contempt again that is his unfortunate misfortune. He has a duty.

It is very well established law that the Grand Jury has the right to every man's evidence. Just because a man is willing to take a contempt to avoid answering the Grand Jury's questions doesn't mean that he immunizes himself from contempt after any period of time. I think that the only legitimate bounds on inquiry by a Grand Jury is the bounds prescribed by the statute of limitations. I think that is for a very good reason.

This is a separate proceeding having nothing to do with the prior proceeding. I brought it to the

the your Honor's attention so that you will have the full background of this case.

With respect to his claim that the immunity would be invalid before this Grand Jury, I would like to read the authorization supplied by the Deputy Attorney General. As your Honor knows, Section 6002 and 6003 provides that the Court, on application of the United States Attorney will -- it is not a discretionary question, it is where the Court is serving in its capacity as head of the Grand Jury, and the Court shall, on application of the United States Attorney, if authorized by the Attorney General, issue a grant of immunity.

In this case, Judge Platt did, upon authorization of Deputy Attorney General Lawrence H. Silberman and the request -- the authority granted was as follows:

Your request for authority to apply to the US District Court for the Eastern District of New York for an order or orders requiring Michael Sherman to give testimony and provide other information, pursuant to 18US Code 6002, 6003, in the above matter and in any further proceedings resulting therefrom, or ancillary thereto, is hereby approved pursuant to the authority vested in me by 18US Code Section 6002, 6003.

He is presently before another Grand Jury, but the investigation has not ended. The investigation is quite alive.

The United States is investigating not only an obstruction of justice, it is also investigating perjury on the part of Mr. Proman, Marvin Proman, a witness before the court, before Judge Judd in the Superfecta case, and Mr. Sherman has very relevant testimony concerning that possible perjury by Mr. Proman.

The last two questions that I have brought to your Honor's attention are directly related to the question of whether Mr. Proman committed perjury or not at that trial. There is ample time left under the statute of limitations, there are four years left.

THE COURT: All right.

MR. WEISS: Your Honor, to the best of my knowledge no allegation that Mr. Sherman himself has been a party to an obstruction of justice or that he has perjured himself exists.

Indeed, I state in the memorandum that if the Government feels that it may have a case of that nature, I would welcome their bringing such a charge that in fact we could clear the air. I don't think that there is any basis for it.

On the specific legal aspect of the application, I have read exactly the section and it is really on that basis that I indicate to your Honor that I think there is a very serious legal question.

The interesting thing here is that Mr. Sherman's appearance before the May, 1974 Grand Jury was first directed before the May, 1972 Grand Jury itself had been terminated, a month before, when Mr. Sherman was -- almost a month before, when Mr. Sherman was inadvertantly released by Allenwood -- as an after-thought, when he came down, they decided to put him before still another jury. I don't think was proper. I don't think that the language in Mr. Silberman's letter to Mr. Trager, which said that in the above matter and in any further proceedings resulting therefrom, which I would assume would be if there were an indictment on the basis on anyone's testimony, Mr. Sherman would be asked to come and testify in the proceeding resulting therefrom, or ancillary thereto.

I would think that again would be that same jury discontinuing perhaps delaying some of its actions, but then picking them up again. I note that in the order that Judge Platt signed, dated March 17th, 1975, the reference is to before the special Grand Jury in the Eastern District of New York. There is

no indication of any special Grand Jury or all of the special Grand Juries, it is simply addressed to the special Grand Jury before which Mr. Sherman had appeared and before which he had taken his Fifth Amendment privilege and then was directed to answer.

On that, your Honor, I again renew my request.

MR. RITCHIE: Your Honor, the application does not specify any particular special US Grand Jury. He is presently before the special May, '74 Grand Jury.

I believe that this still has force and affect at the present time.

THE COURT: When does the Grand Jury meet again?

MR. RITCHIE: Next Monday, your Honor.

THE COURT: I will give him until Friday morning to make up his mind whether he is going to testify or not. If he does not, we will have a hearing on it and the Court will decide it then.

MR. RITCHIE: Normally, your Honor, before there can be a contempt hearing he has to refuse to answer after being ordered by the Court, and Friday, unless he is ordered by the Court today --

THE COURT: That is what I am telling you. I'm giving until Friday to make up his mind and telling him he has to answer the questions before the Grand Jury right now.

MR. RITCHIE: I don't think he can be held --

THE COURT: I am not holding him in contempt.

MR. RITCHIE: He is ordered to reappear before the Grand Jury and answer those questions tonight, and if he doesn't on Friday we will have a contempt hearing?

THE COURT: On this Friday.

MR. RITCHIE: Yes.

THE COURT: When does the Grand Jury come in again, next Monday? We better do it after that.

You want it before that Grand Jury or after it?

MR. RITCHIE: We will do it -- it's up to the Court.

THE COURT: Let's do it a day after.

They are here now. I order him today to go before the Grand Jury and answer those questions. If not, then Friday we will have a hearing for contempt.

MR. WEISS: Would you honor consider referring the matter to Judge Judd?

THE COURT: No, I will not consider that.

It is not going back to the original judge.

MR. WEISS: I was not Mr. Sherman's attorney at the time that he appeared before the May, 1972 Grand Jury. I would appreciate receiving at your direction, your HONOR, a clear indication as to what questions

Mr. Sherman has already answered and what questions he was asked at that earlier jury which he did not answer, if that is appropriate.

MR. RITCHIE: He only answered questions on one day. I don't think it has even been that long that he doesn't remember them. On March 17th he answered questions for approximately an hour and that's it.

MR. WEISS: Given the circumstances --

MR. RITCHIE: I don't think that the Grand Jury, the secrecy should be breached in this instance, your Honor.

I think that with all due respect to Mr. Weiss it only aids a person to either commit perjury or to continue to be in contempt.

His directive is clear, this witness is under no danger of being imprisoned. All he has to do is answer truthfully and he does not have to know what he answered before. If he answers truthfully there is no perjury.

MR. WEISS: Those are famous last words. It seems to me that the reason people are given the right to have counsel and are given the chance to look at statements that they had previously made in the course of a trial, and so on, is to exactly allow them

to refresh their recollection as to what they may have said.

I am not asking for a transcript, what I am asking for is an indication as to what questions were put to Mr. Sherman --

THE COURT: Were any of these questions answered by him previously?

MR. RITCHIE: No, your Honor. He refused to answer the two questions concerning the attorney last March 24th and the other two questions he refused to answer last week.

THE COURT: All right. These questions have not been answered by him.

MR. WEISS: I have no assurance from Mr. Ritchie as whether in fact he is not going to repeat questions which he may have asked previously which my client may have responded to previously.

It seems to me only fair for me, without the transcript, to be given a clear idea as to what questions may have been previously been put to him and what responses he gave.

MR. RITCHIE: Although I don't think I am under any obligation, I will go this far: He has previously answered questions concerning the fact that after his flight he went to Florida, Puerto Rico, New Orleans,

California and Cape Cod.

MR. SHERMAN: Cape Cod?

MR. RITCHIE: Let the record reflect that the witness has been assisting me.

MR. WEISS: He has been assisting you for nine months now.

THE COURT: He has not completed the assistance. I direct him to answer that. If he fails we will have a hearing on civil contempt on Friday morning.

(Whereupon at 5:20p.m. the matter was concluded.

1 UNITED STATES DISTRICT COURT
2 EASTERN DISTRICT OF NEW YORK

3 ----- x
4 In Re: Grand Jury :
5 (MICHAEL SHERMAN) :
6 Respondent. :
7 ----- x

8
9 United States Court House
10 Brooklyn, New York

11 May 14, 1978 *mm*
12 10:00 A.M.

13 B e f o r e:

14 HON. MARK A. COSTANTINO,

15 U.S.D.J.
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17
18
19
20
21
22
23

24 ILENE GINSBERG
25 Official Court Reporter

1
2
3 **A p p e a r a n c e s :**

4 **DAVID G. TRAGER, ESQ.,**
5 **United States attorney for the**
6 **Eastern District of New York**

7
8 **By: DAVID RITCHIE, ESQ.,**
9 **Asst. U. S. Attorney.**

10
11 **THEODORE S. WEISS, ESQ.,**
12 **Attorney for Respondent.**

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1 MR. RITCHIE: David Ritchie for the Government.

2 MR. WEISS: Theodore S. Weiss, attorney for
3 the respondent.

4 MR. RITCHIE: Since this is a matter arising
5 from a Grand Jury investigation I believe this would
6 have to be either at side bar or in a closed court-
7 room.

8 THE COURT: Everyone will please leave the
9 courtroom at this point except for the marshal, and
10 that includes all attorneys.

11 (Whereupon the courtroom was cleared except
12 for those indicated.)

13 MR. RITCHIE: Your Honor, this hearing stems
14 from a Grand Jury proceeding in which your Honor
15 had ordered the witness to respond to certain ques-
16 tions.

17 On Monday, May 5th, your Honor originally
18 set this down for the following Friday. Mr. Weiss
19 was unable to make it on Friday because of another
20 engagement arising from the office he holds. We
21 therefore set this down for Monday or Tuesday and
22 I wasn't in. I contacted Mr. Golumb yesterday and
23 asked it be set down for today.

24 The question now is whether Michael Sherman
25 should be held in contempt.

1
2 Mr. Weiss submitted a brief. I don't think
3 there is a factual question that Mr. Sherman was asked
4 to answer certain questions and refused last Monday.

5 Mr. Sherman has raised a number of questions,
6 six points altogether; five dealing with whether or
7 not he should be held in contempt.

8 The second point raised in his brief and the
9 fourth point raised in the brief were previously raised
10 on Monday, May 5th, and your Honor ruled that he must
11 answer the questions.

12 Mr. Sherman raises three other questions as
13 points one, three and five, dealing with whether he
14 should be held in contempt.

15 The first question is whether he should be held
16 in contempt because I am not properly a government
17 attorney within the meaning of Rule 6(e) and that has
18 come to be known as the Crispino issue.

19 Point three is whether or not he has been the
20 subject of electronic surveillance. I can cover that
21 quickly. I am familiar with the investigation and the
22 precise point on which Mr. Sherman believes he was
23 electronically surveilled. I made the representation
24 to Mr. Sherman on two occasions that I believe he was
25 not electronically surveilled.

The questions that were put to Mr. Sherman with

1 respect to who paid the attorney fees for him in re-
2 gard to Mr. Fisher and Mr. Yoot does not arise from
3 the electronic surveillance and are not even connected
4 with the incidents he believes may have led to elec-
5 tronics surveillance and are not even connected with
6 the incidents he believes may have led to electronic
7 surveillance.

8 The other question put to him, whether or not
9 he had a conversation with Mr. Proman on March 20,
10 1973 had nothing whatsoever to do with the incident
11 he believed led to electronic surveillance.

12 I will make the representation there was no
13 electronic surveillance, legal or illegal, of any
14 kind, serving as a predicate for the questions posed.
15 There is not even a factual connection between Mr.
16 Sherman's belief and the questions posed.

17 The fifth point raised by Mr. Sherman as to
18 the question concerning who paid the fees for Mr.
19 Fisher and Mr. Yoot, he doesn't have to answer, he
20 says because of the attorney-client privilege.

21 Well, on that point, your Honor, I'd just like
22 to note that the attorney-client privilege is a privi-
23 lege that goes to the communications between attorney
24 and client, not to the existence of a relationship or
25 the salient facts of a relationship.

1 Yesterday I called your Honor's chambers

2 I had been out two days on personal business -- and I
3 just wanted to square it away with the Court that we
4 did hold the hearing today and I believe it was Mr.
5 Golumb -- no, it was Mr. Gould -- who mentioned he
6 had received the brief and raised the point that the
7 attorney-client privilege was asserted, and said,
8 "Do you have any authority on that?"

9 I was home at the time. I don't have a very
10 extensive library. I told him that McCormack on
11 Evidence sets that forth very well. I didn't have
12 the section on it then and I don't have it now, but
13 it would be in McCormack on Evidence, where it states
14 that the salient facts of the existence of a relation-
15 ship, when the relationship was entered into and such
16 facts as that, are not covered by the attorney-client
17 privilege.

18 The question of where a man received money to
19 pay his attorney is certainly not a communication
20 between attorney and client but between client and
21 third party, if it is a communication, and it involves
22 a transaction and the passage of money. It would be
23 between the client and a third party and not the
24 attorney and the client.

25 So, I don't think there is a semblance of sub-
stance in the attorney-client privilege as asserted.

1 THE COURT: In other words, you are telling
2 me in any event the amount of money received would
3 be reported as income so it wouldn't make a difference
4 how much he received.

5 MR. RITCHIE: Yes.

6 THE COURT: There is no privilege as to that.

7 MR. RITHCHIE: If the attorney-client privi-
8 lege were extended to the fact situation we have here,
9 then any attorney in the world could easily commit
10 tax evasion and get away with it.

11 THE COURT: You are saying it wouldn't run
12 between the client and the attorney but rather
13 between the client and the third party who may have
14 given him the money. In other words, if I went to
15 a bank and borrowed a thousand dollars to pay my
16 lawyer, someone would have the right to know that.
17 It sounds like a salient argument.

18 Do you have anything to say about that?

19 MR. WEISS: Yes, your Honor.

20 I think --

21 THE COURT: It is actually no more than a
22 hidden disclosure as to who puts up bail for an
23 individual.

24 MR. WEISS: But this goes to the heart of the
25 capacity to have legal representation and it seems

1 to me that once you are able to infringe on it to the
2 extent that you can demand to know what the source of
3 the fees are to retain an attorney, then I think you
4 are opening the door to, really, other so-called "side"
5 or not germane questions that start eating away at
6 the right to have an attorney.

7 THE COURT: The fact that one situation -- when
8 you deal with a privileged situation -- the fact that
9 one may not be privileged and a statement forthcoming
10 may encompass a privileged statement, that would be
11 marked "privileged" and not part of a revelation by
12 client or lawyer if they desire not to do so.

13 I can see a limitation on it but the thing
14 that troubles me is that the source of money, the
15 source of money other than let's say, in a situation
16 where he is being charged with the source of money,
17 such as being charged with monies in a court -- we
18 are talking about "where did you get 'X' money" as
19 an individual and there is no question that he had a
20 right to pay you. He is not disputing that he had
21 a right to pay his lawyer --

22 MR. RITCHIE: No, I never do that.

23 THE COURT: -- the question is, where does
24 he get the money to pay his lawyer. Where is that a
25 privilege?

1 I can understand your answering that it might
2 militate against him as far as a guilty knowledge
3 situation is concerned or it may lead to an individual
4 you don't want to lead to. But that doesn't make it
5 privileged.

6 MR. WEISS: I think the right to counsel is a
7 constitutional right.

8 THE COURT: Surely.

9 MR. WEISS: For example, in the Tierney case
10 Justice Douglas -- one of the grounds for his granting
11 bail and a stay of execution in a civil contempt pro-
12 ceeding, was to the question that he wanted to deter-
13 mine if there was an invasion. It seems to me that
14 it is concerned very, very seriously in the higher
15 courts in this situation.

16 THE COURT: I don't know of any considerations
17 of an invasion by reason of someone saying "I received
18 money from John Jones to pay my lawyer." That has
19 nothing to do with the privileged communication with
20 his lawyer, the counsel he is receiving, the admissions
21 or nonadmissions he is making to his lawyer.

22 MR. WEISS: Let's take it a step further.

23 THE COURT: Surely. I don't mind talking
24 about it. It gives me a chance to think.

25 MR. WEISS: "Where did you get the money?"

1 Assume that is answered. "Where did you give it to
2 your lawyer? Who was present? What were the circum-
3 stances?" The next thing we know, the very confi-
4 dentiality, the sacred aspect is violated.

5 THE COURT: Assume they said to him -- forget-
6 ting the source of the money -- "You and so-and-so
7 and so, three people, what were you talking about
8 at that time?" They are trying to connect it up.
9 It wouldn't have anything to do with money. As long
10 as he told the three people on the outside -- between
11 you and him -- but not the three people --

12 MR. WEISS: That's right, but in this situa-
13 tion --

14 THE COURT: I am just expounding my reasoning.
15 I am not saying I am right. I only sound right to
16 myself.

17 MR. WEISS: Interestingly, it ties into the
18 other point we raised.

19 The reason we present our point so extensively
20 is that the very electronics surveillance we think
21 too place involved the discussion between the respond-
22 ent and another individual in relation to securing
23 monies to pay an attorney to represent him.

24 So, it seems to me that what the Government
25 is doing is in this instance, starting off with an

1 improper area; that is, improper in trying to breach
2 the lawyer-client relationship in order to try to
3 establish something else which I think also may be
4 in violation -- well, there is a question as to
5 whether or not there was lawful or nonlawful electronic
6 surveillance, if there was any.

7 It is a chain kind of situation they are build-
8 ing on.

9 MR. RITCHIE: I would like to note, first of
10 all, that Mr. Sherman has previously testified in the
11 Grand Jury concerning this conversation which he feels
12 was electronically surveilled. He did not assert the
13 attorney-client privilege on that. He testified in
14 the Grand Jury that that particular conversation
15 concerned money to pay a Mr. Paul Caruso, an attorney
16 in Los Angeles. There was nothing whatsoever to do
17 with paying for Mr. Fisher or Mr. Yoot.

18 The basis for asking the question as to who
19 paid Mr. Fisher's fee and who paid Mr. Yoot's fee,
20 arose from the fact that Mr. Sherman at that time
21 that he was arrested and shortly thereafter, stated
22 to the Government that the only reason he got that
23 thousand dollars was so he could retain an attorney
24 to turn himself in. It was from that point, knowing
25 he had no funds to pay Mr. Caruso, that we asked

1 "How did you manage to retain Mr. Fisher and Mr. Yoot,"
2 and he said, "I got money from friends."

3 The question now is, what friends?

4 Even if he had the attorney-client privilege,
5 I think he waived it when he stated that he had friends
6 and I say there is none to begin with.

7 All the Government is asking now is who those
8 friends are.

9 MR. WEISS: Without disrespect intended toward
10 Mr. Ritchie or the question of motivation, it seems
11 to me neither the Court nor I should be expected to
12 accept Mr. Ritchie's recapitulation.

13 MR. RITCHIE: I can show you the Grand Jury
14 minutes.

15 MR. WEISS: Even then, I think there is a legal
16 question involved as to whether that would apply to
17 this proceeding we are having before this Grand Jury.

18 THE COURT: A waiver for one time is a waiver
19 for all times.

20 MR. RITCHIE: I wouldn't even present that
21 waiver. I will submit outright, there is no attorney-
22 client privilege.

23 MR. WEISS: My client advises me that his re-
24 collection is that he did waive the lawyer-client
25 privilege at that time.

T.2

1 THE COURT: It wouldn't rest on that in any
2 event.

3 I think I will reserve decision.

4 MR. WEISS: May I be heard in response to the
5 other points Mr. Ritchie made.

6 To start with, I am in a semi-awkward position
7 in that I have an affidavit prepared after consulta-
8 tion with the respondent. I have not been able to
9 find a notary and if we could have the respondent
10 placed under oath that it is his affidavit and he
11 swears to the truth of it --

12 MR. RITCHIE: No objection.

13 THE COURT: Surely.

14 MR. RITCHIE: After Mr. Weiss finishes speaking
15 I'd like to cover one more point which I have not
16 covered -- point one.

17 (Whereupon Mr. Sherman and Mr. Weiss signed a
18 document which was then handed to the Court.)

19 THE COURT: Would you raise your hand, Mr.
20 Sherman.

21 (Respondent Sherman complies.)

22 THE COURT: You have read your affidavit?

23 RESPONDENT SHERMAN: Yes.

24 THE COURT: Your affidavit dated May 14, 1975?

25 RESPONDENT SHERMAN: Yes.

1 THE COURT: Do you swear before this Court that
2 the contents of that affidavit made by you for sub-
3 mission to the Court with reference to this proceeding
4 as a respondent in U.S.A. v. Michael Sherman is true
5 to the best of your knowledge?

6 THE RESPONDENT: I do.

7 MR. WEISS: Thank you, your Honor.

8 THE COURT: And that the signature that appears
9 on the affidavit, sir, is your signature?

10 THE RESPONDENT: It is.

11 THE COURT: And you signed it May 14, 1975?

12 THE RESPONDENT: Today, right?

13 THE COURT: You just signed it now. Did you
14 sign it today, May 14, 1975?

15 THE RESPONDENT: Yes, I did.

16 THE COURT: In the presence of the Court?

17 THE RESPONDENT: I did.

18 THE COURT: All right.

19 MR. WEISS: If your Honor please, for the
20 purpose of the hearing, I have raised a number of
21 factual questions and I think, so the record may be
22 complete, I would like to have entered into the
23 record the purported designation of Mr. Ritchie.
24 He has given me a copy but I don't think that has
25 gone into the record at this point.

1 MR. RITCHIE: I have a copy for the Court.

2 MR. WEISS: If we can have that marked for ad-
3 mission into the record.

4 Your Honor, we raise the question in our brief --
5 and I will not take the Court's time -- as to the
6 insufficiency of that designation under Section 515,
7 United States Code.

8 The second question involving fact and law --
9 I would like to request at this time that we have
10 entered into the record the authorizations which Mr.
11 Ritchie and Mr. Trager received from the Attorney
12 General or his designee authorizing him to seek an
13 order granting the respondent Michael Sherman immunity
14 and directing him to answer, together with the other
15 supporting letters and affidavit.

16 M R. RITCHIE: Copies of those have been
17 appended to Mr. Sherman's brief and I have looked at
18 them and they are accurate copies of the letters of
19 authorization.

20 MR. WEISS: For the record then, is it in
21 fact understood that there are no new decisions,
22 letters of authorization or requests?

23 MR. RITCHIE: That is correct, your Honor.

24 MR. WEISS: If I may be heard again, very
25 briefly, because I have addressed this I think in the

1 brief sufficiently, it is our point that legally, that
2 authorization is insufficient; that we could carry this
3 to a ridiculous extreme by suggesting that three years
4 from now the U. S. Attorney may still be conducting
5 the investigation with five changes of Attorney
6 Generals and deputies and Mr. Ritchie may still want
7 to come in with that immunity as to the Special Grand
8 Jury of May, 1972.

9 THE COURT: You addressed that in the brief.

10 MR. RITCHIE: If I may respond.

11 Point one, Mr. Sherman raises the entire ques-
12 tion of authorization and goes a little beyond the
13 issue of Crispino which was the presence of an unauthor-
14 ized person in the Grand Jury.

15 In addition to my having no right to be before
16 the Grand Jury, Mr. Sherman also states I had no right
17 to authorize immunity.

18 Section 515 on which Crispino is based has
19 nothing to do with -- it is to allow certain government
20 personnel, special attorneys to go before the Grand
21 Jury -- it has nothing to do with my power to apply
22 for a grant of immunity.

23 In this case I not only applied for the grant
24 of immunity but also Mr. Trager, and he is the United
25 States Attorney, and your Honor I think can take

1 judicial notice that he was appointed by the President
2 with the approval and advice of the Senate.

3 Specifically page 5 is a letter from Mr. Trage
4 to the Judges of the District Court for the Eastern
5 District of New York. It is done that way so whoever
6 is miscellaneous judge can receive the letter. That
7 is page 5 of the appendix.

8 With respect to whether or not Mr. Sherman
9 should be held in contempt or not held in contempt --
10 because I was not in front of the Grand Jury -- I don't
11 see what relevance as to who the examiner is, as to
12 the question of whether or not he should be held in
13 civil contempt.

14 This witness was specifically directed by the
15 Court, not by the attorney for the Government or the
16 foreman of the Grand Jury, but directed by the Court
17 to answer questions before the Grand Jury.

18 It was a direction by your Honor and I think
19 your Honor can take judicial notice of the fact that
20 you are a judge in the Eastern District. Anybody
21 can pose questions but only the Court can specifically
22 direct an individual to answer the questions and the
23 Court has done that.

24 The Court is of the opinion that there is some
25 question as to the authority of special attorneys --

1 THE COURT: No. I don't think I have any
2 serious delusions, let's say, about the authority of
3 yourself or anyone else in your department.
4

5 The only food for thought, probably under the
6 circumstances, is the point raised by Mr. Weiss as to
7 where you keep changing Grand Juries, and does the
8 authority continue on an additional or continuing
9 investigation.

10 I don't know of any case directly on point and
11 I don't think anybody else does.

12 It could be solved administratively, let's say,
13 and it should be solved that way.

14 If it is going to going to cause a legal propo-
15 sition for the teacher where opinions must be written
16 and determinations made and there is a simple avenue
17 that can be followed to resolve the problem, the
18 simple avenue should be pursued.

19 MR. RITCHIE: I had not been aware of the
20 contention of Mr. Sherman until two weeks after he
21 first appeared before the Grand Jury. For the first
22 two weeks he was unable to answer questions because
23 counsel was not present. After the third week, that
24 was the first time he raised that question.

25 I'd like to say that he has been given a grant
of immunity with respect to an investigation before

1 the special May, 1972 Grand Jury. The file number is
2 reported in the official transcript of the March 24th
3 hearing wherein he was held in contempt: 74,1762, and
4 I have already informed the Court that the investiga-
5 tion is still proceeding under that file number. The
6 only thing changed is the Grand Jury.

7 I submitted an affidavit to this Court last
8 Monday with respect to prior proceedings in this case,
9 and I informed the Court -- through an affidavit --
10 that before the Grand Jury, the special May '74 Grand
11 Jury, a large number of witness had appeared in connec-
12 tion with this investigation, 74, 1762, which is an
13 instruction of justice situation.

14 Mr. Sherman didn't happen to be introduced in
15 front of this Grand Jury but rather the other Grand
16 Jury, the one since expired, and that was done for
17 the reason that the May '74 Grand Jury has had a
18 heavy volume of work. The '72 Grand Jury was a Grand
19 Jury that was the jury that had originally indicted
20 the Superfecta case and had personally heard Mr.
21 Sherman's testimony briefly, and because of those
22 factors, particularly the question of time allotment,
23 he was taken in front of that Grand Jury. He could
24 have been taken in front of the May '74 Grand Jury
25 and they have heard a lot more witnesses than the

1 May '72 Grand Jury in this case.

2 THE COURT: That is a completed case?

3 MR. RITCHIE: I am going to trial on Monday on
4 that indictment. I am on trial in front of Judge
5 Mishler for the last of the defendants.

6 THE COURT: So, that would be the last.

7 MR. RITCHIE: Right.

8 There is one more point I'd like to raise on
9 that and that is that Mr. Weiss has stated that there
10 would be some sort of abuse if I were able to use an
11 immunity year after year after year, and I submit,
12 if I were using that immunity before different Grand
13 Juries for five investigations there would be an abuse
14 because the Attorney General is the man who has to
15 decide, or his designee, whether that particular case
16 we want to grant a person immunity on. But, this is
17 precisely the same case he was questioned under in
18 the special May '72 Grand Jury.

19 THE COURT: What you are saying to me, then,
20 is that it is really a continuing situation and there-
21 fore has really terminated or lapsed into finality
22 anyway. So, it is continued and the immunity would run
23 with it before any Grand Jury investigating the same
24 programs.
25

1 MR. RITCHIE: Yes, and it is continued only
2 because Mr. Sherman has not answered the questions.

3 MR. WEISS: If I may, the fact is that the
4 Supreme Court of the United States has been very
5 strict regarding procedures to be used.

6 The Udino case is a classic example and we
7 heard the same arguments from the Attorney General
8 and United States Attorney's office as to how they
9 say there were administrative programs and it made
10 no difference because there were sufficient factual
11 matters and it was stated in Sections 602 and 603 of
12 18, U.S.C. and they stated that when Congress sets
13 down procedures they should be followed.

14 Now, it is not for Mr. Ritchie to make deter-
15 minations. It is for Congress and Congress has deter-
16 mined the issue.

17 Now, on the allegations that electronic sur-
18 veillance was utilized, it is my understanding that
19 it is not sufficient for Mr. Ritchie to come forward
20 and say in front of the Court that he can testify
21 there was no electronic surveillance. It is my un-
22 derstanding he must come in on a sworn affidavit on
23 the basis of an investigation, internally conducted,
24 affirming or denying whether or not there was
25 electronic surveillance.

1
2 THE COURT: Either that or he must tell the
3 Court that he made a complete search of all of the
4 departments that might have information on it and
5 reveal whether or not there was electronic surveillance.

6 MR. WEISS: On the basis of that response we
7 can make our next application to the Court as to what
8 ought to transpire.

9 MR. RITCHIE: I am familiar with the investi-
10 gation that led up to the capture of Mr. Sherman who
11 was a fugitive at that time --

12 THE COURT: No. He is asking you to file an
13 affidavit and I don't think it is necessary if you
14 place on the record that you called the Justice Depart-
15 ment or your own chief and you are advised there had
16 been no electronic eavesdropping of this respondent
17 under the circumstances, and you can make that full
18 disclosure on the record. That is all the Court re-
19 quires. I don't ask you to sit down and write out
20 "I, David Ritchie --"

21 MR. WEISS: Some courts require that.

22 THE COURT: I don't. I take a lawyer's word
23 for it. If they give me false information, then --

24 MR. WEISS: In the Milo case I believe the
25 Supreme Court found when the matter reached it for
the first time, the Government said "Gee, that information

1 we gave you off the top of our heads is not right."

2
3 THE COURT: That happens, too. If it is an
4 honest mistake, that is one thing. But, if deliberate,
5 that is another thing.

6 MR. WEISS: There are eight agencies of govern-
7 ment and we would require a response from each --

8 MR. RITCHIE: I can't say that I contacted
9 eight agencies but I will tell you under oath that
10 I contacted the one agency involved in this case
11 and that is the FBI, and the one agency that captured
12 Mr. Sherman at that time that he was a fugitive, and
13 it was at the time he was captured that he alleges
14 he was the subject of the electronic surveillance,
15 and I can state to the Court that there was no
16 electronic surveillance by that agency. The agents
17 were not aware -- the agents who captured Mr. Sherman
18 -- were not aware of any electronic surveillance.
19 Their information came through more traditional means.

20 THE COURT: That's all he can tell us.

21 MR. WEISS: Right, and I don't think that is
22 sufficient.

23 THE COURT: Sure.

24 I'll accept the statement.

25 I have one question and then I must terminate
the argument and go by the briefs. I am going to

1 reserve decision in any event.

2 I want to know, was the payment of fees worked
3 out in the communications between counsel and client
4 or client and a third party?

5 MR. WEISS: Whether the payment of fees was
6 worked out --

7 THE COURT: In a communication between counsel
8 and client or between the client and some third person.

9 MR. WEISS: I want to consult with him for a
10 moment, if I may.

11 THE COURT: Yes.

12 (Counsel and client confer without the hearing
13 of the reporter.)

14 (Pause.)

15 MR. WEISS: Your Honor --

16 THE COURT: If you can't answer it --

17 MR. WEISS: No, no. I think the only fair
18 answer I can give is that there were discussions be-
19 tween respondent and his attorneys about fees. There
20 may have been some discussion with other people as well.

21 THE COURT: All right.

22 I will reserve decision at this time.

23 MR. WEISS: Thank you, your Honor.

24 MR. RITCHIE: Yes, sir.

25 MR. WEISS: Do we have any kind of index

1
2 notation? I'd like to file the copy of the affidavit
3 and other papers.

4 THE COURT: Here is the affidavit. You ought
5 to file the original, I think. What is the original
6 proceeding number so he can file an affidavit with it?

7 MR. RITCHIE: This is a Grand Jury matter.
8 There are not -- they should be given civil numbers
9 if any numbers and they are not.

10 I tried to locate --

11 THE COURT: Well, when I sign the immunity
12 paper isn't there a number on that?

13 MR. RITCHIE: No, there is not.

14 MR. WIESS: The one question I had not asked
15 is that I would like to have entered into the record
16 some indication as to the testimony before the Grand
17 Jury that supposedly my client did not respond -- you
18 know -- that's not part of the record at this point
19 and I believe it should be to have a full record.

20 I would like your Honor's direction as well as
21 the questions and answers before --

22 THE COURT: Yes, that's my direction.

23 MR. RITCHIE: I will file a copy of the steno-
24 graphic minutes, your Honor.

25 THE COURT: Will you do that?

MR. RITCHIE: Yes, your Honor.

1 MR. WEISS: Thank you for your courtesy, your
2 Honor.

3 THE COURT: Just one moment.

4 What I wanted to ask you -- on second thought,
5 he said he may have spoken to other people about it.
6 Is there any declaration of that you can give me
7 because it goes to the heart of the whole situation.

8 MR. WEISS: It's very difficult, your Honor.
9 There is no question that he discussed fees with
10 the attorneys mentioned. No question about that at
11 all.

12 THE COURT: I don't doubt that. They are not
13 a charitable organization. No lawyer works for
14 nothing.

15 Did he discuss with other persons about ob-
16 taining money to pay the lawyers' fees?

17 MR. WEISS: Again, to the best I can make out
18 on quick consultation, at this point it is my best
19 judgment that there was no specific discussion as to
20 utilization of monies which were being discussed --
21 that's the best I can make out on quick discussion --
22 with third parties.

23 MR. RITCHIE: I simply submit before you can
24 get enough money to pay an attorney a fee you have
25 to ask somebody for the money -- even if he stole it.

1 THE COURT: Now, it is left to me to decide
2 whether there was a waiver of a privilege, whether
3 there was a privilege in the first place, and whether
4 the privilege was between the lawyer and the client.
5

6 I will reserve decision.
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GOVERNMENT'S EXHIBIT - LETTER
DATED SEPTEMBER 28, 1972 HANDED
UP TO THE COURT AT PAGE 53a

2a

ASSISTANT ATTORNEY GENERAL
CRIMINAL DIVISION

Department of Justice
Washington 20530

September 28, 1972

Mr. David J. Ritchie
Criminal Division
Department of Justice
Washington, D. C.

Dear Mr. Ritchie:

As an attorney and counselor at law you are hereby specially retained and appointed as a Special Attorney under the authority of the Department of Justice to assist in the trial of the case or cases growing out of the transactions hereinafter mentioned in which the Government is interested. In that connection you are specifically directed to file informations and to conduct in the Eastern District of New York and in any other judicial district where the jurisdiction thereof lies any kind of legal proceeding, civil or criminal, including grand jury proceedings and proceedings before committing magistrates, which United States Attorneys are authorized by law to conduct.

The Department is informed that various persons, companies, corporations, firms, associations, and organizations to the Department unknown have violated in the above-named district and in other judicial districts the laws relating to extortion in aid of racketeering (18 U.S.C. 1951), embezzlement of union funds (29 U.S.C. 501(c)) and the funds of welfare and pension plans (18 U.S.C. 664), payments by employers to their employees and to officials of labor organizations (29 U.S.C. 186), the filing of reports and the maintenance of records by unions and union officials (29 U.S.C. 439), deprivation of the rights of a union member by force (29 U.S.C. 530), obstruction of justice (18 U.S.C. 1503), obstruction of criminal investigations (18 U.S.C. 1510), obstruction of state or local law enforcement (18 U.S.C. 1511), travel and transportation in aid of racketeering (18 U.S.C. 1952), transmission of bets, wagers, and related information by wire communications (18 U.S.C. 1084), interstate transportation of wagering paraphernalia (18 U.S.C. 1953), prohibition of illegal gambling businesses (18 U.S.C. 1955), racketeer influenced and corrupt organizations (18 U.S.C. 1962), perjury (18 U.S.C. 1621), false declarations (18 U.S.C. 1623), mail fraud (18 U.S.C. 1341), fraud by wire (18 U.S.C. 1343), interstate transportation of stolen property (18 U.S.C. 2314), wire and radio communication (47 U.S.C. 203 and 501), internal revenue (26 U.S.C. 7201-7206), and other criminal laws of the United States and have conspired to commit all such offenses in violation of Section 371 of Title 18 of the United States Code.

GOVERNMENT'S EXHIBIT - LETTER
DATED SEPTEMBER 28, 1972 HANDED
UP TO THE COURT AT PAGE 53a

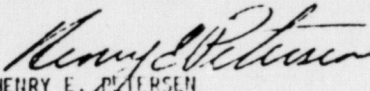
3a

- 2 -

You are to serve without compensation other than the compensation you are now receiving under existing appointment.

Please execute the required oath of office and forward a duplicate thereof to the Criminal Division, Department of Justice.

Sincerely,


HENRY E. PETERSEN
Assistant Attorney General

1
2 UNITED STATES DISTRICT COURT
3 EASTERN DISTRICT OF NEW YORK
4 -----x

5 In the Matter :
6 of :
7 Grand Jury Testimony of :
8 MICHAEL SHERMAN, :
9 -----x

10
11 United States Courthouse
12 Brooklyn, New York

13
14 June 2, 1975

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Before :

HONORABLE MARK A. COSTANTINO, U.S.D.J.

MICHAEL MIELE
OFFICIAL COURT REPORTER

1
2 **Appearances:**

3
4 **DAVID G. TRAGER, ESQ.**
5 **United States Attorney**
6 **for the Eastern District of New York**

7
8 **BY: DAVID RICHIE, ESQ.**
9 **Assistant U.S. Attorney**

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THEODORE S. WEISS, ESQ.
Attorney for the Respondent

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2 MR. RICHIE: Your Honor, this is in the matter
3 of Michael Sherman.

4 We are doing this at side bar because of the
5 fact that it is a grand jury matter.

6 At the present time I would like to inform the
7 Court that I am preparing an order of judgment and
8 committal.

9 Now, Mr. Sherman and Mr. Weiss are here. I
10 believe the only thing we have to do now is to settle
11 the question of bail.

12 Your Honor set bail at \$1,000. It is not quite
13 clear as to whether it is a personal appearance bond
14 or a surety bond. The Government would state its
15 objection to any bail in this matter, but in the event
16 that the Court will set bail the Government has no
17 objection to it being a personal appearance bond.

18 THE COURT: All right.

19 First of all, I must find he is in contempt.
20 He has not testified.

21 You have not testified; is that right?

22 THE DEFENDANT: No.

23 THE COURT: You do not intend to testify?

24 THE DEFENDANT: That is right.

25 THE COURT: Well, the Court finds you in

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contempt and there will be a personal recognizance bond of \$1,000 pending appeal.

MR. RICHIE: The sentence is six months or until such time as the length of the grand jury, whichever is longer?

MR. WEISS: On the length of time, I recognize that as always, as a Respondent has in this situation, he has the keys in his own pocket and at the same time he has served an appreciable amount of time between the sentence which he pled to and the sentence on the prior grand jury.

Since he is always subject to being called back, I wonder if you would consider a lower sentence of six months.

THE COURT: I think it is academic at this point in any event.

See what occurs on your appeal and at that time make an application.

MR. WEISS: If your Honor please, in order for our appeal to be perfected we would require transcripts of certain grand jury testimony as well as the testimony and hearings held before your Honor, before Judge Neaher and before Judge Platt.

I wonder if you could direct Mr. Richie to make available to me and to the defendant copies of

1 of his grand jury testimony both before May 1972 and
2 May 1974, and as well as the court appearances that I
3 have mentioned.

4 MR. RICHIE: The Government's only request would
5 be that if your Honor does order it that there be a
6 restriction placed on Mr. Weiss and Mr. Sherman that it
7 not be shown to anyone besides themselves.

8 THE COURT: For his own personal use, for
9 purposes of appeal.

10 MR. WEISS: No objection to that.

11 MR. RICHIE: Anything that is sent to the Second
12 Circuit by way of a record would be under seal.

13 THE COURT: Yes.

14 MR. RICHIE: We will have to work out the
15 mechanics.

16 MR. WEISS: I have no objection to it as long
17 as someone tells me what that means.

18 THE COURT: I have difficulty in understanding
19 that myself.

20 MR. WEISS: Do we proceed to wait for your
21 preparation of a written order?

22 THE COURT: You will do that today, won't you?

23 MR. RICHIE: It will be done today.

24 You have filed a notice of appeal in this
25 matter.

1 MR. WEISS: Then we go to the Magistrate?

2 MR. RICHIE: We will go now.

3
4 * * *

RESPONDENT'S MEMORANDUM
DATED MAY 5, 1975

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - x

IN RE: GRAND JURY INVESTIGATION :

MICHAEL SHERMAN, :

Witness-Respondent. :

MEMORANDUM

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Michael Sherman has been in jail continuously from June 25, 1974 to May 2, 1975 with the exception of a portion of April 10, 1975.

Together with approximately 30 others, he was indicted in the Eastern District in December, 1973 and charged in two counts with the crimes of sports bribery and conspiracy to commit sports bribery.

He left jurisdiction of the Eastern District prior to the return of the indictment and was not present during the trial. He was in the process of arranging to turn himself in to the authorities, having already retained an attorney for that purpose, when he was apprehended and arrested on June 25, 1974 in Los Angeles, California. He was returned to New York on July 15, 1974 and pleaded guilty to both counts of the indictment in September of 1974.

It should be noted here that of the numerous other defendants who were arrested and of the many who were tried, only two were ever convicted. The appeal on those two cases has apparently not yet finally been concluded.

RESPONDENT'S MEMORANDUM
DATED MAY 5, 1975

2.

On November 15, 1974, Mr. Sherman was sentenced to a term of 18 months by U.S. District Court Judge the Hon. Orin Judd. The sentence was imposed after a full probation report and it is my understanding that the Court at the sentencing received a commitment on the record from the Assistant U.S. Attorney handling the case that no further prosecution of Mr. Sherman would be sought. It is respectfully suggested that given the circumstances this Court may consider it just and appropriate that the matter be referred to Judge Judd's consideration and determination.

While serving his sentence at the Allenwood facility in Pennsylvania sometime in mid-February, 1975, Mr. Sherman was brought down to New York and on or about the 5th of March was placed before the May, 1972 Special Grand Jury. At that time, he refused to answer any questions on the basis of the Fifth Amendment privilege. Thereafter, David J. Ritchie, Special U.S. Attorney, applied for and was granted authorization to seek an order granting Michael Sherman immunity and directing him to testify. Although he answered a number of questions put to him, he refused to answer a question which inquired as to who had sent him the money to retain an attorney and sometime subsequent to March 21, 1975 was cited for civil contempt and sentenced to serve a period of 6 months or until the life of the Grand Jury terminated which ever first occurred. He was then re-

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RESPONDENT'S MEMORANDUM
DATED MAY 5, 1975

turned to Allenwood.

On April 10, 1975, the parole board apparently following the recommendations made at the time of sentencing released Mr. Sherman on parole. Mr. Sherman indicated to the authorities at Allenwood that he was also being held on the contempt charge and that in his opinion he did not think it appropriate for them to release him. He was advised that there was nothing in his file at Allenwood to provide any basis for holding him further and was directed to leave. Mr. Sherman returned to New York immediately contacting his then attorney who communicated with Mr. Ritchie of the U.S. Attorney's Office and appeared in Mr. Ritchie's office by pre-arrangement on April 11, 1975. Instead of being credited with the good faith which he had demonstrated in once again turning himself in, he was advised by Mr. Ritchie that Mr. Ritchie intended to place him before a different Grand Jury and have him cited for contempt once more eventhough he was still serving time based on the original citation.

On April 21, 1975, this was done. However, since Mr. Sherman had no attorney, the matter was continued to give him an opportunity to retain counsel. I was retained subsequently during that week but because of a conflict in my schedule, could not appear on the 28th. On that date, Mr. Sherman was directed to return on May 5, 1975 with counsel.

RESPONDENT'S MEMORANDUM
DATED MAY 5, 1975

4.

In the meantime, the life of the May, 1972 Grand Jury has terminated and Mr. Sherman was released on Friday, May 2nd.

Without alluding to any questions of law which may be raised, but simply on the basis of fairness, it is respectfully urged that the effort to place Mr. Sherman before a Grand Jury once more be discontinued or at least delayed.

Michael Sherman is approximately 35 years of age. He had never prior to his indictment for sports bribery and conspiracy to commit that act been arrested or indicted on any other charge. He has indicated to the U.S. Attorney, to the Court and to the Grand Jury that he has never had and does not now have any involvement with organized crime at any level. He participated in no plan or conspiracy to obstruct justice. He pleaded guilty to the crimes with which he was charged and has never told anything but the truth in any of his Court or Grand Jury appearances.

If the U.S. Attorney believes that he has any basis for prosecuting Mr. Sherman for any crime whatsoever, he ought to undertake such prosecution but to place Mr. Sherman in the context of the chronology of this memorandum in further vulnerability of citation for civil contempt seems grossly unfair and unjust. The effort, it is respectfully submitted is no longer to coerce meaningful testimony from this witness but to punish him under the guise of coer-

RESPONDENT'S MEMORANDUM
DATED MAY 5, 1975

5.

cion. It is for this reason that it was most respectfully suggested earlier in this memorandum that this entire matter be referred to the Hon. Orin Judd who sentenced Mr. Sherman upon his plea of guilty and is fully familiar with the entire background of Mr. Sherman's case.

Respectfully submitted this 5th day
of May, 1975.

Theodore S. Weiss, Esq.
Counsel for Michael Sherman,
Witness-Respondent
Office & P.O. Address
250 Broadway
New York, New York 10007
(212) 962-2800

RESPONDENT'S MEMORANDUM
DATED MAY 13, 1975

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - x

IN RE: GRAND JURY INVESTIGATION :
UNITED STATES OF AMERICA, :
Petitioner, :
- against - :
MICHAEL SHERMAN, :
Respondent. :

- - - - - x

RESPONDENT'S MEMORANDUM OF LAW IN
OPPOSITION TO THE GOVERNMENT'S APPLI-
CATION FOR AN ORDER PURSUANT TO
28 USC 1826(a) ADJUDICATING RESPON-
DENT IN CIVIL CONTEMPT.

Preliminary Statement

This memorandum of law is submitted in opposition to a motion by the government pursuant to 28 USC 1826(a) for an order adjudging Respondent MICHAEL SHERMAN in Civil Contempt based upon his refusal to answer questions posed to him by Special Department of Justice attorney Ritchie following a purported grant of statutory testimonial immunity.

Factual Background

The facts and surrounding circumstances of this case up to May 5, 1975, are fully stated in Respondent's previous memorandum dated May 5, 1975. It is respectfully requested that the Court deem said memorandum to be included in its entirety at this point.

On May 5, 1975 Michael Sherman appeared by direction of Special Attorney David J. Ritchie before the May, 1974 Special Grand Jury for the Eastern District of New York. Upon information and belief, the following four questions, in substance, were put to him by Mr. Ritchie:

1. Who gave you the money to pay the legal fees of your attorney Harry Youtt?
2. Who gave you the money to pay the legal fees of your attorney Andrew Fisher?
3. Did you have a conversation with Marvin Prouman on March 20(?), 1973?
4. Did you on March 20(?), 1973 give Marvin Prouman a sum of money regarding a certain horse race?

RESPONDENT'S MEMORANDUM
DATED MAY 13, 1975

On advice of counsel, Mr. Sherman refused to answer the questions on the basis of his rights pursuant to the 1st and 5th Amendments to the U. S. Constitution. Mr. Ritchie then advised the respondent that he was granting him immunity against self incrimination and directed him to answer the questions. The respondent refused to do so on the basis of the previously stated grounds. Mr. Sherman was then taken before U. S. District Court judge the Hon. Mark Costantino. After a presentation of the facts and some questions of law by Mr. Ritchie and Mr. Sherman's attorney, Theodore S. Weiss, Esq., Judge Costantino directed that Mr. Sherman had to answer the questions and further advised that in the event of his refusal to do so he would set a hearing date to determine whether Mr. Sherman should be held in civil contempt.

Mr. Sherman then was returned to the Grand Jury where, upon information and belief, Mr. Ritchie in substance, asked him the following question:

Where did you get the money to pay the
legal fee of your attorney Harry Youtt?

RESPONDENT'S MEMORANDUM
DATED MAY 13, 1975

4.

Respondent refused to answer on the basis of his previously stated grounds and was advised to return for the instant hearing to determine whether he should be held in civil contempt.

POINT I

THE FORM LETTER ASSIGNING SPECIAL DEPARTMENT OF JUSTICE ATTORNEYS IS OVERLY BROAD AND FAILS TO COMPLY WITH 28 USC 515(a). AS SUCH, SPECIAL ATTORNEY RITCHIE IS AN UNAUTHORIZED PERSON BEFORE THE GRAND JURY. HE MAY NOT QUESTION RESPONDENT IN THE GRAND JURY NOR MAY HE APPLY FOR IMMUNITY. NO CONTEMPT CITATION, THUS, MAY ISSUE.

David J. Ritchie is a Special Department of Justice attorney assigned to the Brooklyn Strike Force and is not an Assistant United States Attorney. As such a special attorney, his power to act is generated by and must conform with the mandates of 28 USC 515(a) which states:

"The Attorney General or any other officer of the Department of Justice, or any attorney specially appointed by the Attorney General under law, may, when specifically directed by the Attorney General, conduct any kind of legal proceeding, civil or criminal, including grand jury proceedings.."

RESPONDENT'S MEMORANDUM
DATED MAY 13, 1975

5.

Upon information and belief, Mr. Ritchie was assigned to general legal duties as a member of the Stike Force, and was not "specifically directed" by the Attorney General to investigate and present to a Grand Jury the matter of Michael Sherman.

We specifically adopt herein and call to the Court's attention the learned opinion and legal reasoning of Judge Werker in United States v. Crispino, 16 Cr.L. 2503 (S.D.N.Y. Feb. 13, 1975). We agree with Judge Werker that the bureaucratic change in the Form Letter by which Special Attorneys are approved by the Justice Department constitute a dramatic change in the enforcement and prosecution of this nation's criminal statutes. To the extent, we submit, that the new form letters of appointment exceed and expand upon the literal language of 28 USC 515(a), an unlawful usurpation and exercise of raw power, is present.

Respondent respectfully submits that to the extent that the Brooklyn Stike Force generally, and Special Justice Department Attorney Ritchie in particular have attempted to accrete to themselves additional powers neither contemplated nor legislatively recognized, they are acting in an ultra vires manner and beyond their power. In essence, since

RESPONDENT'S MEMORANDUM
DATED MAY 13, 1975

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prosecutor Ritchie's power is not sufficiently circumscribed to fit within 28 USC 515(a) he is powerless to question respondent, seek statutory immunity for the respondent, or move to have respondent cited for civil contempt. (28 USC 1826(a) (18 USC 6002, 6003).

In addition, since prosecutor Ritchie and the local Strikeforce have exceeded their power by dint of the unreasonable and unlawfully broad Justice Department form letter, Ritchie and his prosecutorial colleagues are improper persons to be presenting evidence, questioning witnesses and making general use of the expansive federal grand jury power.

By reason of the fact that Ritchie was not specially authorized by the form letter to proceed in this case, neither he nor the Strike Force any longer possess de jure power to apply for immunity or move for an order seeking to hold respondent in civil contempt.

If 28 USC 515(a) means what it says, all that can be said for Ritchie is that he is exercising de facto power under color of federal law. His power to lawfully function and his statutory authorization for compelling testimony in

RESPONDENT'S MEMORANDUM
DATED MAY 13, 1975

7.

exchange for testimonial immunity are brought into serious doubt.

No man's liberty should be taken away by one whose authority to act, if at all, is drawn so gravely into question. If the Strike Force wants more power or greater flexibility, let them seek it of Congress. Lawful power exists only so far as the Congress clearly gave it; it can not be created by anonymous bureaucrats.

In the instant matter the power of the Strike Force and that of Mr. Ritchie seem to exist only because they claim it. Certainly the statute does not grant it. (See U. S. v. Giordano, 40 LEd 2nd 341 (1974)).

POINT II

PETITIONER'S LETTER AUTHORIZING THE GOVERNMENT TO APPLY FOR A GRANT OF IMMUNITY DOES NOT EXTEND TO THE MAY 1974 GRAND JURY.

Petitioner contends, and respondent does not dispute, that by a letter dated March 14, 1975 (see respondent's appendix at p. A-1) Deputy Attorney General Laurence H. Silberman authorized Special Attorney Ritchie to make application to a judge of this court for an order compelling Michael Sherman to give testimony or provide evidence before

RESPONDENT'S MEMORANDUM
DATED MAY 13, 1975

a grand jury empanelled in the District. Ritchie's request for the authorization to seek to compel testimony in return for a grant of immunity was submitted after respondent, on March 3, 1975, appearing before the May 1972 Special Grand Jury for the Eastern District of New York repeatedly asserted his 5th Amendment privilege. (See respondent's Appendix at p. A-2 (Ritchie's affidavit)). In his application to the Court for the Order to compel respondent's testimony Ritchie stated that respondent had been subpoenaed to appear before the Special Grand Jury on March 17, 1975 and "is expected to invoke and has invoked" (emphasis added) the 5th Amendment "to questions posed to him by the aforesaid Grand Jury." (emphasis added) (Respondent's Appendix p. A-3 Trager-Ritchie Application)

It is clear on the face of these documents that the Application applied to the same Special Grand Jury before which respondent had already appeared, i.e., May 1972.

Pursuant to the Government's request the Hon. Thomas C. Platt entered an order on March 17, 1975 pursuant to 18 USC 6002 and 18 USC 6003. Thereafter, respondent Sherman appeared before the May 1972 Special Grand Jury and declined

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to respond to Special Attorney Ritchie's questions and was held in civil contempt insofar as his conduct constituted a violation of 28 USC 1826(a). Respondent was then remanded to the custody of federal marshals for a period of six months or until the life of the grand jury terminated; whichever first occurred. Respondent was so incarcerated and was ultimately released from confinement on May 2, 1975 by reason of the termination of the grand jury's life.

It now appears that the Government is intent upon attempting to utilize the civil contempt power to coerce respondent into abandoning his Fifth Amendment right to remain silent. To the extent that a valid offer of testimonial immunity is proffered, respondent is obligated to cooperate. We contend however, that absent a new letter of authorization, empowering Special Attorney Ritchie to apply anew to this Court for an order pursuant to 18 USC 6002-6003, that the prosecutor is powerless to seek, and this Court to grant, immunity from prosecution.

Simply put, respondent contends that each grand jury constitutes a separate proceeding requiring an individual authorization for immunity. We dispute the Government's

assertion that Deputy Attorney General Silberman's letter of March 14, 1975 empowers Special Attorney Ritchie to apply to the May 1974 Special Grand Jury or the implied claim that Mr. Silberman's letter was intended to cover however many grand jury appearances, before unknown grand juries, in futuro.

A fair reading of Mr. Silberman's letter reveals a limited authorization to seek immunity before a then existing grand jury. It was patently not Mr. Silberman's intent to grant Special Attorney Ritchie carte blanche and timeless use of the immunity application power.

With the expiration of the life of the May 1972 grand jury, Mr. Ritchie's authorization, to make application for a grant of immunity, terminated. Only a "fresh" authorization, by the statutorily designated high Justice Department officials, may serve as a predicate for this Court's grant of testimonial immunity to respondent in his appearance before this "new" Grand Jury.

We contend that the old authorization of March 14, 1975 existed only so long as the life of the earlier grand jury. With the termination of that grand jury the authorization ceased to have force and effect as a statutory predicate

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for the judicial grant of testimonial immunity. Accordingly, until such time as a new authorization is obtained*, this Court lacks the power to extend immunity. As such, the Fifth Amendment privilege to remain silent remains viable.

The Court's attention is directed to U. S. v. Giordano 40 LEd 2d 341 in which the United States Supreme Court very strictly construed the procedural safeguards and requirements built into the 1968 Omnibus Crime Control and Safe Streets Act. Although the Sections of the code (18 USC 2510 et seq.) differed from the ones we are dealing with here, the issues were all but identical, i.e., was power exercised by one authorized by statute? and were the procedural requirements for seeking certain orders and authorizations (regarding electronic surveillance) in accord with the statutes?

*The need for a "fresh" authorization takes on an especially germane aspect when one considers that since the authorization of March 14, 1975 the Hon. Edward Levi has been confirmed as Attorney General, and the Hon. Harold Tyler has become Chief of the Criminal Division. It may well be that these new Justice Department officials would decline to authorize additional grand jury action, and an additional grant of immunity. The need for reapplication and re-examination is paramount.

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POINT III

RESPONDENT MUST BE ADVISED IF HE HAS BEEN THE SUBJECT OF ELECTRONIC SURVEILLANCE. IF HE HAS, THE GOVERNMENT MUST DEMONSTRATE THAT ITS SURVEILLANCE WAS CONDUCTED IN CONFORMITY WITH THE LAW.

It is now well recognized that a grand jury witness who believes he has been the subject of unlawful electronic surveillance may validly decline to respond to grand jury questioning even if the recipient of testimonial immunity (Gelbard v. United States, 408 U.S. 41 (1972); 18 USC 2525; People v. Einhorn, 35 NY 2d 948, 949 (1974)). The respondent has, we submit, just cause for believing that he has been the subject of such surveillance. In large measure, this belief centers upon the fact that it was only after respondent placed a telephone call to the New York area, from California, requesting that money be wired to Los Angeles, California so that local (Los Angeles, California) counsel could be retained, that respondent was taken into federal custody.

To the extent that respondent's telephone calls were intercepted and recorded and serve as the basis for the grand jury questioning at bar, a viable refusal to testify will lie.

Therefore, respondent calls upon the Government, pursuant to 18 USC 3504, to conduct an internal investigation and submit a sworn affidavit affirming or denying the use of electronic surveillance (see United States v. Toscanino, 500 F 2d, 267, 281 (2d Cir. 1974); In re. Evins, 452 F 2d 1239, but cf. United States v. Grusse and Turgeon, F 2d , (2d Cir., Feb. 27, 1975).

Should the Government disclose that respondent has been the subject of such electronic surveillance, we would ask for discovery of the eavesdrop order and supporting affidavits. (See In re Lochiatto, 497 F 2d, 803 (1st Cir. 1974); In re Mintzer, 511 F 2d, 471, 473(1st Cir. 1974)). At the very least, we would ask the Court to conduct an in camera inspection of the eavesdrop order and supporting papers to insure that they have been obtained in conformity with the statutory prerequisites. (See In re Persico, 491 F 2d, 1156 (2d Cir. 1974), cert. den. U. S. 95 S.Ct. 197 (1974)).

POINT IV

FURTHER CONFINEMENT OF RESPONDENT IS PROHIBITED BY 28 USC 1826(a)(2), RESPONDENT HAVING ALREADY SERVED A SENTENCE FOR THE LIFE OF A GRAND JURY FOR CIVIL CONTEMPT IN A

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PROCEEDING INVOLVING THE SAME INVESTIGATION AND THEREFORE CONTINUED QUESTIONING OF HIM BEFORE THIS "NEW" GRAND JURY IS IMPROPER.

The language of Section 1826 is crystal clear. The Court is authorized upon refusal of a witness to comply with the Court's order to testify to order his confinement "until such time as the witness is willing to give such testimony." But the statute then proceeds to provide some very clear cut limitations as follows:

"No period of such confinement shall exceed the life of (1) the court proceeding, or
(2) the term of the grand jury, including extensions, before which such refusal to comply with the court order occurred, but in no event shall such confinement exceed eighteen months."

It can not be questioned that respondent has (1) served a sentence for civil contempt for refusing to comply with the Court's order dated March 17, 1975 to testify before a Special Grand Jury, (2) that this refusal occurred before the May 1972 Special Grand Jury whose life terminated on or about May 4, 1975, and (3) that the subject matter of

RESPONDENT'S MEMORANDUM
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the investigation being conducted by the May 1974 Grand Jury is identical to that of the May 1972 Grand Jury.

It may be arguable that prior to the adoption of Section 1826 even in spite of the manifest unfairness of punishing someone repeatedly for the identical offense, the cases permitted it.

With the adoption of Section 1826 Congress clearly delineated both the power of the courts and the extent of permissible punishment. The outside limit the statute allows is 18 months or the life of the Grand Jury whichever is less. The choice of which Jury to place respondent before belonged to the Strike Force. Having made that choice, and the respondent having served the time which the law allowed, the Strike Force should not now be aided in its efforts to have the court disregard the clear intent of Congress.

Any further efforts to order respondent's testimony, or to hold him in civil contempt for his refusal to do so would, it is respectfully submitted, be wholly improper.

POINT V

THE GOVERNMENT'S QUESTIONING CONSTITUTES AN IMPROPER INVASION UPON THE ATTORNEY-CLIENT PRIVILEGE.

The Government has demonstrated an abiding, and we

contend, improper basis for ascertaining where and how respondent obtained the moneys to retain his attorney.

We contend that the information sought is beyond the scope of discovery because respondent is free to refuse to answer based upon the existence of the attorney-client privilege. Respondent respectfully submits that where and how the money to retain counsel is obtained fits squarely within the penumbra of confidential words and deeds which need not be disclosed. The need to promote full cooperation between attorney and client would be irrevocably damaged if litigants and their lawyers knew that something as essential as the amount of the fee and its source, were the subject of subsequent grand jury scrutiny.

A fair respect for the sanctity of the attorney-client privilege provides an ample basis for respondent's refusal to testify.

POINT VI

ASSUMING arguendo THAT THIS COURT DETERMINES TO HOLD RESPONDENT IN CIVIL CONTEMPT, A STAY OF EXECUTION OF JUDGMENT SHOULD BE GRANTED TO PERMIT AN EXPEDITIOUS REVIEW BY THE COURT OF APPEALS.

28 USC 1826(b) permits the subject of a civil contempt

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citation to be admitted to bail pending appellate review unless the Court is satisfied that:

1) the appeal is frivolous;

and

2) the appeal is taken for delay.

Only a finding that both elements are present will suffice to deny admission to bail.

The right to bail pending appeal has been given a liberal construction. In Tierney v. United States, 409 U.S. 1232, 93 S.Ct. 17, 34 L.Ed. 2d 37 (1972) Justice Douglas granted bail pending appeal even though Justice Powell had previously denied the bail application (See also In re Dionisio, 442 F. 2d 276, rev'd. other grds 410 U.S. 1, 35 L.Ed. 2d 57).

We submit that the issues raised supra are both substantial and nonfrivolous. Nor is the appeal to be undertaken for delay. We are prepared to submit this case to an expedited appellate schedule if so advised by the Court of Appeals.

In addition, it must be remembered that when respondent was released from the Allenwood facility on April 10,

RESPONDENT'S MEMORANDUM
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1975, it was respondent, not the Government, who took the initiative in contacting Mr. Ritchie. He did so on the very day of his release from Allenwood, knowing that he would be re-incarcerated for the civil contempt citation of March 21, 1975; and he did so having been continuously incarcerated as of that date since June 25, 1974.

Respondent is clearly not the type of individual who would be expected to flee the jurisdiction. His voluntary action in notifying the Government when released on parole indicates the quality of the individual. It should be noted too that he is on parole from Allenwood and leaving the Court's jurisdiction would subject him to charges of violating the conditions of parole.

CONCLUSION

THE COURT SHOULD DECLINE TO ENTER AN ORDER ADJUDGING RESPONDENT IN CIVIL CONTEMPS (28 USC 1826(a)). IN THE ALTERNATIVE, THE COURT SHOULD STAY EXECUTION OF JUDGMENT AND ADMIT RESPONDENT TO PAROLE OR ~~RESPONSIBLE~~ BAIL PENDING APPEAL.

REASONABLE

Dated: New York, New York
May 13, 1975

Respectfully submitted
THEODORE S. WEISS
Attorney for Respondent
(212) Wo-2-2800
Theodore S. Weiss
250 Broadway
New York, New York 10007

ROGER BENNET ADLER
OF COUNSEL

APPENDIX 1 - LETTER OF AUTHORIZATION DATED
MARCH 14, 1975

OFFICE OF THE DEPUTY ATTORNEY GENERAL
WASHINGTON, D. C. 20530

(Government Seal)

MAR 14 1975

Mr. David G. Trager
United States Attorney
Brooklyn, New York

Attention: Mr. David J. Ritchie
Special Attorney
Brooklyn Strike Force

Re: Grand Jury Investigation

Dear Mr. Trager:

Your request for authority to apply to the United States District Court for the Eastern District of New York for an order or orders requiring Michael Sherman to give testimony or provide other information pursuant to 18 U.S.C. 6002-6003 in the above matter and in any further proceedings resulting therefrom or ancillary thereto is hereby approved pursuant to the authority vested in me by 18 U.S.C. 6002-6003.

Sincerely,

/S/
LAURENCE H. SILBERMAN
Deputy Attorney General

APPENDIX 2 - AFFIDAVIT OF DAVID J. RITCHIE SWORN
TO MARCH 17, 1975

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

IN RE: GRAND JURY INVESTIGATION

STATE OF NEW YORK) SS:
COUNTY OF KINGS)

DAVID J. RITCHIE, being duly sworn, says:

1. That he is a Special Attorney for the Department of Justice, and that he has been directed by the Attorney General to assist in the investigation of a criminal matter now pending before the Special Grand Jury of the United States District Court for the Eastern District of New York.

2. That the Grand Jury investigation relates to violations of Title 18, United States Code, Section(s) 224, 1503, 1510 and 371.

3. That the testimony of MICHAEL SHERMAN is necessary to the public interest.

4. That MICHAEL SHERMAN, while appearing on March 3, 1975 before the Grand Jury conducting the inquiry repeatedly asserted his fifth amendment privilege with respect to the question asked.

5. That the information sought is material

APPENDIX 2 - AFFIDAVIT OF DAVID J. RITCHIE SWORN
TO MARCH 17, 1975

and necessary to the investigation being conducted by
the Grand Jury.

6. That the application of your affiant in
this matter is made in good faith.

7. That attached as Exhibit D is a letter
in this matter from David G. Trager, United States
Attorney.

s/ David J. Ritchie
DAVID J. RITCHIE
ORGANIZED CRIME SECTION
U.S. DEPARTMENT OF JUSTICE

[Duly sworn to
March 17, 1975]

APPENDIX 3 - APPLICATION

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

IN RE: GRAND JURY INVESTIGATION

NOW COMES THE GOVERNMENT, and by its Attorney, David G. Trager, respectfully requests that an Order be issued by the Court ordering MICHAEL SHERMAN to testify before the Special Grand Jury now sitting in the Eastern District of New York. As grounds therefore, the Government sets forth the following:

1. That the Grand Jury inquiry relates to possible violations of Title 18, United States Code, Sections 224, 1503, 1510 and 371.

2. That the witness MICHAEL SHERMAN has been subpoenaed to appear before the Grand Jury on March 17, 1975, at which time he will be questioned relating to alleged violations of Title 18, United States Code, Sections 224, 1503, 1510 and 371.

3. That the witness MICHAEL SHERMAN is expected to invoke and has invoked the Fifth Amendment as a ground for refusing to answer the questions posed to him by the aforesaid Grand Jury.

4. That it is necessary to the public

APPENDIX 3 - APPLICATION

interest that the witness be required to answer questions directed to him before the aforesaid Grand Jury.

5. That this application is made with the approval of the Assistant Attorney General for the Criminal Division of the United States Department of Justice (see "C" annexed).

Respectfully Submitted,

DAVID G. TRAGER
UNITED STATES ATTORNEY
EASTERN DISTRICT OF NEW YORK

By s/ David J. Ritchie
DAVID J. RITCHIE, SPECIAL ATTORNEY
ORGANIZED CRIME SECTION
U.S. DEPARTMENT OF JUSTICE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

IN RE: GRAND JURY INVESTIGATION

An application has been made to this Court by the United States Attorney (see application and affidavit annexed and marked "A" & "B" respectively) pursuant to his authorization by LAWRENCE C. SILBERMAN, Deputy Attorney General for the Criminal Division of the United States Department of Justice (see copy of letter annexed and marked "C"), wherein the affiant has represented that in his judgment the testimony of MICHAEL SHERMAN before the Special United States Grand Jury in the Eastern District of New York, is necessary to the public interest. Pursuant to Title 18, United States Code, Sections 6002, 6003, it is hereby

ORDERED that MICHAEL SHERMAN answer all questions directed to him by the aforesaid Grand Jury in the Eastern District of New York. It is further

ORDERED that MICHAEL SHERMAN shall not be excused from testifying or producing books, papers or other evidence on the ground that testimony or evidence required of him may tend to incriminate him or subject

APPENDIX 4 - ORDER OF PLATT, J. DATED MARCH 17, 1975

him to a penalty of forfeiture.

It is further

ORDERED that no testimony or other information compelled under this order (or any information directly or indirectly derived from such testimony or other information) may be used against MICHAEL SHERMAN in any criminal case except a prosecution for perjury, giving a false statement, or otherwise failing to comply with this order.

s/ Thomas C. Platt
UNITED STATES DISTRICT JUDGE
EASTERN DISTRICT OF NEW YORK

Dated: Brooklyn, New York
March 17, 1975

APPENDIX 5 - LETTER IN SUPPORT OF APPLICATION
DATED MARCH 5, 1975



Address Reply to the
Division Indicated
and Refer to Initials and Number

UNITED STATES DEPARTMENT OF JUSTICE

WASHINGTON, D.C. 20530

Organized Crime Section
Criminal Division
Federal Building
35 Tillary Street
Room 327-A
Brooklyn, New York 11201
March 5, 1975

The Honorable Judges of the
United States District Court
for the Eastern District of
New York

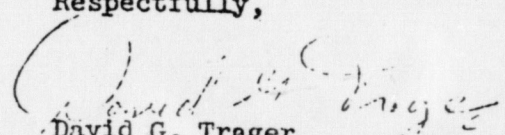
RE: Immunity for Michael Sherman

Dear Sirs:

This letter is submitted in support of an application for an order pursuant to Title 18, United States Code, Sections 6002 and 6003, requiring the above-named individual to give testimony or provide other information.

In my judgment the testimony or other information sought is necessary to the public interest. It is likely that the above-named individual will refuse to testify on the basis of his privilege against self incrimination.

Respectfully,


David G. Trager
United States Attorney
Eastern District of New York

AFFIDAVIT DATED MAY 14, 1975

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - -x

IN RE: MICHAEL SHERMAN :

UNITED STATES OF AMERICA, :

Petitioner, :

- against - :

MICHAEL SHERMAN, :

Respondent. :

AFFIDAVIT
AND
REQUEST FOR AFFIRMATION
OR DENIAL OF ELECTRONIC
SURVEILLANCE

- - - - -x

STATE OF NEW YORK)

: SS.:

COUNTY OF K I N G S)

MICHAEL SHERMAN, being duly sworn, deposes and says:

I am the respondent-witness in the instant proceeding and submit this affidavit in support of my claim that certain of my telephone conversations were subjected to unlawful wiretapping by the Government and that said telephone conversations served as the basis for the grand jury questioning herein.

On May 5, 1975, appearing before the May, 1974 Special Grand Jury, the Special Strike Force Attorney, Mr. Ritchie, asked four questions of me. Two of them were inquiries as to where I had gotten the money to pay the legal fees of my previous attorneys Andrew Fisher and Harry Youtt. Upon my refusal to answer I was taken before the Hon. Mark Costantino, U.S. District Court Judge who directed that I answer the questions. Upon being returned to the

AFFIDAVIT DATED MAY 14, 1975

grand jury room. Mr. Ritchie asked me one question: where did I get the money to pay my previous attorney, Harry Youtt. My refusal to answer that question has resulted in this hearing to determine whether I should be cited for Civil Contempt.

On March 17, 1975 I had appeared before the May, 1972 Special Grand Jury and my refusal to answer the exact same question concerning the source of the legal fees which I paid to Mr. Youtt resulted in my being adjudged in civil contempt. I was incarcerated upon sentencing until the termination of the May, 1972 Special Grand Jury on May 2, 1975.

It is evident on the face of this record therefore that questions regarding the source of moneys to pay the legal fees of my previous attorneys are and have been at the very core of the information which the government is and has been attempting to coerce from me.

I believe that the basis for said questions is certain of my telephone conversations which were unlawfully subjected to electronic surveillance by the government and unlawfully intercepted by government agents.

I hold this belief on the basis of the following facts:

While under investigation with approximately 30 others in the so-called Superfecta case, I left the jurisdiction of the Eastern District of N.Y. Subsequently, in December of 1973, I was indicted and charged, in two counts, with the crimes of Sports Bribery and Conspiracy to Commit Sports Bribery. In June of 1974 I was in Los Angeles, California. I had had some discussions with a local (Los Angeles) attorney concerning arrangements to turn myself in to the authorities.

AFFIDAVIT DATED MAY 14, 1975

On June 24, 1974, I participated in a telephone conversation with an individual who was then in the State of New York. In the course of the conversation I told him of my need for money to pay lawyers' fees and asked him to send me money via Western Union to a specified Western Union office, addressed to a mutual friend.

On the following day, June 25, 1974 I was apprehended by federal agents at the specified Western Union office having gone there in the company of the mutual friend to pick up the money which the individual in New York State had wired.

On the basis of these facts I call upon the Government, pursuant to 18 USC 3504 to conduct an internal investigation and submit a sworn affidavit, affirming or denying the use of electronic surveillance and in the event of an affirmative response ask the Court for discovery of the eavesdrop order and supporting affidavits.

Dated: May 14, 1975
Brooklyn, N.Y.

/s/ MICHAEL SHERMAN

Sworn to before me this
14th day of May, 1975

TO: Clerk, U.S. District Court	225 Cadman Plaza East
Eastern District of N.Y.	Brooklyn, NY 11201
Federal Strike Force	35 Tillary Street
Eastern District of N.Y.	Brooklyn, NY

1 UNITED STATES DISTRICT COURT
2
3 EASTERN DISTRICT OF NEW YORK

4 -----X
5 In re: :
6 grand jury testimony, :
7 UNITED STATES OF AMERICA, :
8 -against- :
9 JOHN DOE : re Michael Sherman :
10 -----X

11
12 United States Courthouse
13 Brooklyn, New York

14 March 17, 1975

15
16 B e f o r e :

17 HONORABLE THOMAS C. PLATT, U.S.D.J.
18
19
20
21
22
23
24

25 IRA RUBENSTEIN
ACTING OFFICIAL COURT REPORTER

Appearances:

DAVID G. TRAGER, ESQ.
United States Attorney
for the Eastern District of New York

BY: DAVID RICHIE, ESQ.
Assistant U.S. Attorney

DAVID THAULL, ESQ.
Attorney for Defendant

1
2 MR. RICHIE: Good afternoon, your Honor. My
3 name is David Richie, United States Attorney.

4 THE COURT: Before you go any further,
5 Mr. Richie, is everybody authorized to be here?

6 MR. RICHIE: I guess not, your Honor. I'm
7 sorry.

8 THE COURT: All right.

9 MR. RICHIE: Present in the courtroom besides
10 myself, your Honor, is a grand jury reporter, grand
11 jury foreman, United States Deputy Marshal and Michael
12 Sherman, the witness who is also incarcerated,
13 prisoner at the present time in West St.

14 THE COURT: All right. And my Law Clerk.

15 MR. RICHIE: Your Honor, I would seek at this
16 time an order holding Mr. Michael Sherman in civil
17 contempt. I'll supply a contempt order for your
18 Honor on the grounds he refused to answer questions
19 after being granted immunity pursuant to Title 18
20 Section 6000 to 6003. That order was signed this
21 morning by yourself.

22 Mr. Sherman was originally writted in from
23 Lewisberg prison on February 17. He originally
24 appeared before the grand jury on February 24, at
25 which time his attorney wasn't present and he refused

1 to answer questions on that ground. On the next week,
2 March 3rd, his attorney being present, he was asked
3 questions and he asserted his Fifth Amendment privileges
4 in refusing to answer. He was informed at that time
5 that he would be -- an order of immunity would be sought
6 for this week and that he would be required to appear
7 and if the order of immunity were authorized and signed,
8 he would be required to testify on this date. His
9 attorney was present outside the grand jury room, was
10 advised of those facts by myself. The attorney was
11 advised that he realized there would be help, he was
12 advised and he realized there would be an order of
13 immunity signed.

14 His attorney, his name is Harry Youtt of Manhattan.

15 Harry Youtt's partner, Mr. David Thaul, called
16 me this past Friday, March 14th and advised me, asked
17 if the order of immunity were required. Now I stated
18 that the authorization was required and there would be
19 a grant of immunity on today's date and that Michael
20 Sherman would be required to appear and testify. He
21 advised me that Mr. Youtt would be in Philadelphia and
22 that Mr. Sherman would be advised to answer questions.
23 Mr. Sherman today refused to answer questions on the
24 ground that his counsel wasn't present. Prior to this,
25 again, he advised me of his intention to refuse
questions. I got Mr. David Thaul on the telephone and

1 Mr. Thaul spoke with myself and Mr. Sherman and at the
2 end of speaking with Mr. Sherman, he advised me he
3 advised Mr. Sherman to answer the questions. But that
4 he would seek this procedure.

5 If I as the attorney for the grand jury could
6 put off questions on which Mr. Sherman had particular
7 problems to the end of the inquiry, we could perhaps
8 resolve those problems at that time. Mr. Sherman
9 informed me before he went into the grand jury he
10 wasn't going to answer any questions because his attorney
11 wasn't there and, upon entering the grand jury, being
12 advised of the rights and liabilities of immunity order,
13 questions were put to him, questions concerning this
14 inquiry that the grand jury is investigating;
15 specifically, where he was living in November of 1973.
16 And he refused to answer the questions on the ground he
17 had no counsel present.

18 The materiality of the question concerned where
19 he was living in November of 1973 is this: Mr. Sherman
20 was a --

21 THE COURT: I don't know if I need that at this
22 point. The question is really, is whether he is
23 entitled to have his attorney outside the grand jury
24 room so he may request an opportunity to consult with
25 him from time to time during the course of the grand

1 jury proceeding.

2 MR. RICHIE: Your Honor, on that point I'd like
3 to say this: It has been three weeks past and I was
4 specifically informed by his attorney on Friday that his
5 attorney's partner on Friday; that Mr. Youtt would be
6 unavailable. He would be in Philadelphia and that the
7 witness would answer the questions put to him. It's
8 been three weeks since Mr. Sherman first appeared in the
9 grand jury. He was not asked any questions the first
10 week for the simple reason that his attorney wasn't
11 present; on the second week, when he asserted his
12 Fifth Amendment privilege, I informed the attorney and
13 client that he would be here on the 17th and he should
14 be ready to answer questions because an immunity order
15 would be sought and most likely, authorized and signed
16 by that date and I think, with three weeks gone by, this
17 witness certainly has had the opportunity to consult
18 with counsel.

19 If counsel were available, he certainly could
20 have counsel here at this time. Mr. Youtt is presently
21 engaged before another court, according to Mr. David
22 Thaul. I called up Mr. Thaul after the refusal on the
23 part of Mr. Sherman and Mr. Thaul advised me that he
24 couldn't get down here. For the simple reason he was
25 tied up in depositions this afternoon. I believe that

7
1 after three weeks the witness certainly has had the
2 opportunity to arrange for counsel and if counsel's
3 choice is to be present, counsel certainly could be
4 present. Counsel isn't present and I don't think the
5 grand jury should be delayed any further in its
6 inquiries.

7 THE COURT: I understand your arguments. But,
8 he's still entitled to have counsel both at the time
9 that he is put before a grand jury and he's also
10 entitled to have counsel at this stage of the
11 proceeding. And he has neither.

12 MR. RICHIE: Would it be possible for your Honor
13 to order counsel to be present today?

14 THE COURT: Yes.

15 MR. RICHIE: I can supply the firm's phone
16 number. It's 586-3722.

17 THE COURT: Are you going to call the grand
18 jury?

19 MR. RICHIE: Yes, I will.

20 THE COURT: Until I have a chance to talk to
21 Mr. -- 3732?

22 MR. RICHIE: 586-3732.

23 THE COURT: Mr. David Thaul.

24 MR. RICHIE: Yes, your Honor.

25 I'm not certain the first name -- I know the

1 last name is Thaul. I believe the first name is David.

2 If there is some way of resolving, the jury will
3 sit as long as is necessary. They have been sitting
4 around for quite a while without doing anything.

5 THE COURT: When does the grand jury reassemble?

6 MR. RICHIE: It doesn't reassemble until next
7 Monday, your Honor. I'd like to get this done today.

8 THE COURT: I take it the witness is in custody
9 right now?

10 MR. RICHIE: Presently in Lewisburg prison.

11 THE COURT: Return him to West St.; bring him
12 back next Monday.

13 MR. RICHIE: That's what would happen, your Honor

14 THE COURT: He is not in custody on this case,
15 he's in custody on some other case?

16 MR. RICHIE: He pleaded guilty to both counts of
17 Indictment 73-CR-1068. United States v. Forest, et al.
18 The sports bribery indictment.

19 The testimony that's sought from him is why he
20 fled New York in December 1973, after he began
21 cooperating with the FBI.

22 THE COURT: I had not realized there were in that
23 trial various other drivers. If there was any person
24 who had pled guilty, just one defendant who pled guilty

25 MR. RICHIE: Mr. Sherman was arrested on a bench

1 warrant in connection with this on , I believe it was,
2 June 25, 1974. Twenty-five days after the conclusion
3 of the Superfecta trial and he pleaded guilty.

4 THE COURT: Is Mr. Sherman a driver?

5 MR. RICHIE: No, he isn't, your Honor. He's
6 in that broad classification of gambler, your Honor.

7 THE COURT: He's being held on that charge and
8 how long was he sentenced to?

9 MR. RICHIE: Sentenced to eighteen months, your
10 Honor.

11
12 (continued next page)
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1 THE COURT: So, how much more of a term does he
2 have to serve?

3 MR. RICHIE: I believe he's up for probation on
4 April 9th.

5 THE COURT: Still has some time. Even if there
6 was a decision by this Court --

7 MR. RICHIE: Your Honor, I believe that with an
8 incarcerated prisoner the time that he's sentenced to
9 under or the time he spends under civil contempt time,
10 that's not counted against the other offense.

11 THE COURT: That may well be, but he is still
12 incarcerated. So there is no -- if the Court were to
13 sentence him to and to hold him in contempt, sentence
14 him, three weeks from now, for example, before he was
15 released, he would just go on serving another whatever
16 period of time the Court sentences him to for contempt.
17 Right?

18 If I say on April 1st, the Court were to hold
19 him in contempt and sentence him to a period of time
20 for such contempt, he would go on serving after he
21 finished his present sentence.

22 MR. RICHIE: He would, your Honor.

23 THE COURT: So, it is not that kind of urgency
24 between now and his parole board date to see that a
25 determination is made.

1 MR. RICHIE: The urgency, your Honor, is simply
2 the United States would like answers to those questions.

3 THE COURT: I understand that.

4 MR. RICHIE: Serious questions, why after he
5 began cooperating with the United States in an
6 investigation of the Superfecta, all of a sudden he
7 stopped cooperating and fled to California? He was
8 unavailable for six months until the conclusion.

9 THE COURT: The only other alternative, if
10 Mr. Thaul or Youtt--

11 MR. RICHIE: Youtt, your Honor.

12 THE COURT: If Thaul or Mr. Youtt do not appear
13 this afternoon or next Monday, the Court might assign
14 counsel to him. But apart from that, the only other
15 thing I can do is to order Mr. Youtt or Mr. Thaul to
16 appear here.

17 In any event he is indicted before this Court
18 and if this Court were to hold him in contempt he's
19 entitled to have his counsel present.

20 MR. RICHIE: If yOur Honor could instruct him
21 on what his duties are under the immunity, if he were
22 again put into the grand jury, if he were again asked
23 questions at that time.

24 THE COURT: I am not going to act as his lawyer,
25 Mr. Richie. That idea, he has been advised by his

1 lawyer presumably as to what his obligations are as to
2 immunity. If he still persists in having his lawyer
3 present, he's entitled to have his lawyer present.

4 Both outside the court and jury room and any subsequent
5 proceeding in this court. To make arguments why he
6 shouldn't be punished for contempt.

7 MR. RICHIE: Your Honor, I don't believe that
8 when the attorney is aware and refuses to come he has
9 much of a complaint whatsoever.

10 THE COURT: Well, let me find out. Let me talk
11 to Mr. Thaul and explain the situation to him and I'll
12 see what I can do about getting him here this afternoon.
13 If, in failing to do that even under direction, which
14 I will try to get him here on, I will direct him or
15 Mr. Voutt to be here without fail on Monday. If they
16 fail to be here on Monday, we'll take appropriate action
17 at that time.

18 MR. RICHIE: Yes, your Honor.

19 THE COURT: But stand by and I'll see if I can
20 reach him.

21 (Short recess.)

22 THE COURT: Are you ready, Mr. Richie? All
23 right, Mr. Thaul, you're here representing Mr. Sherman?

24 MR. THAUL: I'm here, your Honor, in response
25 to your request for me to appear. I have not ever met

1 Mr. Sherman until today. I have personally not
2 represented him. My partner, Mr. Voutt, has been.
3 I would just like the record to reflect that.

4 THE COURT: All right. Now, are you, have you
5 had a chance to confer with him?

6 MR. THAULL: Yes. We would like another thirty
7 seconds. We were just at the end of the conversation.

8 THE COURT: All right.

9 MR. THAULL: Perhaps we could stand in the
10 corner for about thirty seconds.

11 I'm not sure we have conferred now, your Honor.

12 THE COURT: All right, go ahead. You under-
13 stand, Mr. Thaul, that Mr. Richie has taken your
14 client in before the grand jury under an order of
15 immunity and he has refused to answer any questions.
16 How do you wish to proceed? Do you wish to now return
17 to the grand jury and you stand outside the room?

18 MR. THAULL: I think, your Honor, I've had a
19 very brief opportunity to discuss the matter with
20 Mr. Sherman and I understand that he is now prepared
21 to return to the grand jury room and to testify subject
22 to any problem on particular Questions which may arise,
23 we have just generally discussed one area, that one
24 just kind of general kind of thing may be a problem for
25 him. Maybe that that question is not at all, will not

1 even be propounded, that kind of area will not even be
2 entered into. I can make myself available to be present
3 outside the --

4 THE COURT: For the balance of the afternoon?

5 THE DEFENDANT: Excuse me, can I say something?

6 THE COURT: I prefer that you do not. You talk
7 to your counsel and he'll talk to me.

8 THE DEFENDANT: I wanted to tell the judge
9 something. It's all right.

10 THE COURT: It's better that you not talk to me.
11 Anything you state here may be used against you. It's
12 better that you talk to your counsel, if you can.

13 MR. THAULL: Your Honor, Mr. Sherman has just
14 indicated to me that his feelings would be that he
15 would be more comfortable if Mr. Youtt was personally
16 representing him rather than I. Because Mr. Youtt has
17 familiarity with the case and also, I take it, has the
18 personal trust and confidence of Mr. Sherman. As I say,
19 I have just met Mr. Sherman and he just met me for the
20 first time.

21 THE COURT: I understand that. But you're
22 Mr. Youtt's partner and Mr. Youtt is familiar with these
23 proceedings and he apparently has left the city to try
24 another case. And you, as his partner will have to
25 stand in his place.

1 MR. THAULL: Again, I can only act as certain
2 things are being told to me. I understand from
3 Mr. Sherman there was a court list, which was posted at
4 the House of Detention which his name did not appear
5 on yesterday and that he spoke to Mr. Youtt yesterday,
6 it was yesterday evening, I can confirm my knowledge,
7 there was a consideration and that Mr. Sherman tells
8 me that he would have wanted to discuss at least some
9 matters with Mr. Youtt prior to appearing before the
10 grand jury. That he did not enter into discussions
11 about those things not realizing or thinking, excuse
12 me, he was not going to appear today. He felt that from
13 his information from the court list there was still
14 time to have that discussion.

15 Mr. Youtt also, of course, I assume, I shouldn't
16 say "I assume" relied on that information and proceeded
17 to court in another matter to a different court on the
18 assumption he would not represent -- I do not wish to
19 represent, to the best of my knowledge, Mr. Youtt would
20 have been here. I don't know the substance of who --
21 what that conversation would have been nor do I know
22 what Mr. Youtt's plans were. I can only say, if he
23 felt that he was not going to be here or at the grand
24 jury appearance today, he would not have taken that
25 into --

1 MR. RICHIE: Your Honor, in that regard I'd
2 like to say in speaking to, with Mr. Thaul1 on Friday
3 I assumed he understood it was the intention of the
4 United States to question Mr. Sherman today or whenever
5 the Court may have said over in West St., there was an
6 administrative error.

7 THE COURT: It's up to Mr. Thaul1. Is that
8 true, Mr. Richie advised you?

9 MR. THAULL: I was not indicating our office was
10 unaware of today's grand jury hearing, but rather the
11 state of mind of Mr. Sherman regarding the conversation
12 last night. I was referring --

13 MR. RICHIE: He's a grand juror, your Honor,
14 from that grand jury in question.

15 Your Honor, I believe we can resolve the problem.
16 It's presently 4:27 and I'll begin questioning
17 Mr. Sherman today. I don't anticipate it being over
18 today. There'll be necessity to bring him back next
19 week. He will be back next week and he will be
20 questioned further under grant of immunity next week.
21 Today, I can start into some areas. If we have any
22 problems, we can drop that area and go on to another
23 area.

24 THE COURT: Why don't you proceed in that fashion

25 THE DEFENDANT: That's fair.

1 MR. THAULL: Acceptable.

2 THE COURT: If you want to call at any time,
3 Mr. Sherman can talk to Mr. Thaul just tell Mr. Richie
4 or whoever the foreman, Mr. Wilkerson, you got to talk
5 to him.

6 THE DEFENDANT: Thank you.

7 MR. RICHIE: Mr. Wilkerson, I know, will go
8 to about 5:15 tonight.

9 MR. THAULL: Thank you, your Honor.

10 THE COURT: Thank you.

11
12 * * *

1 UNITED STATES DISTRICT COURT
2 EASTERN DISTRICT OF NEW YORK
3

-----X

4 In re: Grand Jury Testimony :

5 UNITED STATES OF AMERICA :

6 -against- :

7 JOHN DOE :

8 Re: Michael Sherman :

9 -----X

10
11
12 United States Courthouse
13 Brooklyn, New York

14 March 24, 1975
15 3:00 p.m.

16 B e f o r e

17 HONORABLE THOMAS C. PLATT

18 U.S.D.J.
19
20
21
22
23

24 SHELDON SILVERMAN
25 Acting Official Court Reporter

1
2 **Appearances:**
3

4 DAVID G. TRAGER, Esq.
5 United States Attorney
6 for the Eastern District of New York

7 By: DAVID RICHIE, Esq.
8 Special Attorney

9 HARRY YOUTT, Esq.
10 Attorney for Defendant
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1 THE COURT: May the record show the only
2 persons present in the courtroom are three United
3 States Marshals, Mr. Wilkinson Fierman of the grand
4 jury, the stenographer, and the Assistant United
5 States Attorney. That's all.

6 MR. RICHIE: Special Attorney, your Honor.

7 THE COURT: Special Attorney. And my court
8 stenographer and me.

9 Do you have something to say?

10 MR. RICHIE: Mr. Sherman is an incarcerated
11 prisoner at West Street at this time. He is also a
12 writted-in witness before the Special May 1972
13 grand jury. His attorney is Mr. Harry Youtt, who
14 is coming into the courtroom now.

15 (Mr. Harry Youtt enters the courtroom.)

16 THE COURT: I gather your client was taken
17 before the grand jury pursuant to an immunity order
18 I signed last week.

19 MR. RITCHIE: Yes, your Honor.

20 THE COURT: He has now refused to answer
21 certain questions. Do you wish an opportunity to
22 discuss the situation with him?

23 MR. YOUTT: If I may, for just a moment.
24 I have spoken with him on the phone, but I would
25 like to talk to him again.

(Pause)

THE COURT: Do you wish to make a statement about what has transpired, without revealing what is going on in the grand jury room?

MR. RICHIE: Your Honor, Mr. Sherman is appearing for the fourth week before this grand jury. He originally appeared on February 24th and again on March 3rd, both of which occasions he asserted his Fifth Amendment privilege.

On March 17th, 1975, your Honor signed a grant of immunity pursuant to 18 U.S. Code Section 6002, 6,003. At that time Mr. Sherman continued to refuse to answer questions until Mr. Youtt's partner, Mr. Davidthal, came down to an aborted contempt proceeding. It was agreed at that time that Mr. Sherman would answer the questions, but questions they had a problem answering, he would reserve for this week until he would have a chance to speak with Mr. Youtt.

This morning Mr. Sherman was put in the grand jury, asked certain questions. He answered for a certain length of time, and then there came a time when he stopped answering questions, asserting his privilege under the First Amendment right to free association, and under the Ninth Amendment's

1 right to privacy.

2 MR. YOUTT: Your Honor, if I may, just to
3 add to the record: since last week I was on trial
4 during the days of last week. However, I arranged
5 with the Court for Thursday morning to be free to
6 consult with the defendant, with Mr. Sherman.

7 I did that. I spoke with him at some length
8 at the West Street Federal Detention Center. We
9 discussed the areas of interrogation last week
10 and I think he asked me all the questions that he
11 wanted to ask me about his legal status at that time
12 and thereafter he has appeared before the grand jury
13 this morning up to today.

14 THE COURT: Is he going to persist in his
15 refusal? You know the general nature of the ques-
16 tions being asked, and did you consult with him on
17 this?

18 MR. YOUTT: Mr. Ritchie advised me of the
19 general nature of the questions being asked, and
20 Mr. Sherman has indicated he will persist.

21 THE COURT: I'm going to have to ask that you
22 be excused while the questions are read to the Court.
23 I will then, if I find them to be appropriate, I will
24 issue a direction to him that he answer the particu-
25 lar questions and he will then return to the grand

1 jury. If he does not answer the questions after
2 the Court's order, he will be brought back here.
3 He will be asked if he is going to continue to
4 persist in refusing to answer questions. If he
5 does, I will have no alternative but to hold him in
6 contempt and sentence him accordingly.

7 MR. YOUTT: I would like the record to show
8 that his refusal to answer these questions is not
9 based upon advice of counsel, at least on any
10 advice that I, my firm, has given him.

11 MR. RICHIE: Your Honor, Mr. Sherman has
12 stated that he is refusing on the two enumerated
13 grounds, on the advice of his attorney, and I have
14 spoken to Mr. Youtt about this and Mr. Youtt has
15 stated that he did not so inform Mr. Sherman and so
16 far as I'm aware, Mr. Youtt is the only attorney
17 Mr. Sherman has. I accept Mr. Youtt's representa-
18 tion that he didn't so advise him.

19 THE COURT: I don't know except for his own
20 satisfaction if it makes much difference, because
21 if he's legally required to answer the questions,
22 whether Mr. Youtt told him to answer or not doesn't
23 make too much difference.

24 MR. RICHIE: I realize that, your Honor.

25 THE COURT: I'm afraid I'll ask you to step

1 out, Mr. Youtt, but I'll get you back in a few
2 moments.

3 (Mr. Youtt leaves the courtroom.)
4

5 N I N A C O D E N, called as a witness,
6 having been duly sworn by the Clerk of the Court,
7 testified as follows:

8 THE CLERK: Full name for the record, please.

9 THE WITNESS: Nina Coden, C-o-d-e-n.

10 THE COURT: If you can find them, read to the
11 Court the questions that Mr. Sherman has refused to
12 answer.

13 THE WITNESS: "Question: Now, how much money
14 was paid to Messrs. Fisher and Fisher?

15 "Answer: I just gave you the answer,
16 a thousand dollars.

17 "Question: Who did you get that money from?

18 "Answer: I'm not going to answer.

19 "Question: What was that?

20 "Answer: I refuse to answer.

21 "Question: Do you realize you have a grant
22 of immunity? Has that been explained to you?

23 "Answer: Yes.

24 "Question: I will put this question to you:
25 Who gave you the thousand dollars to pay Mr. Fisher?

1 "Answer: I am refusing to answer on the
2 grounds of the First Amendment, right to free asso-
3 ciation and the Ninth Amendment, right to privacy.

4 "Question: Who gave you these rights, an
5 attorney at law? Were they given to you by an
6 attorney at law?

7 "Answer: Yes.

8 "Question: By whom?

9 "Answer: I don't have to tell you that,
10 either.

11 "Question: Were they given to you by an
12 attorney, Mr. Youtt?

13 "Answer: They were given my attorney--
14 That's all I can--

15 "Question: Who is your attorney, for the
16 record?

17 "Answer: Mr. Youtt is my attorney.

18 "Question: That advice was--

19 "Answer: No advice. These are two constitu-
20 tional rights that I am bringing up right now.

21 "Question: From whom did you receive those
22 two rights?

23 "Answer: I don't think you have a right to
24 ask me that. I think that's a client--

25 "Question: Mr. Sherman, we have a right to

1 know who is advising you.

2 "Answer: I don't think you have--
3 I have advice--

4 "THE FOREMAN: We have a right to know your
5 attorney and who is advising you.

6 "Answer: I told. I am not going to tell
7 you how he advised me.

8 "Question: I will ask you this question again:
9 Who gave you the thousand dollars to give Mr. Fisher?

10 "Answer: I am refusing to answer.

11 "Question: Who gave you the money you gave
12 to Mr. Youtt?

13 "Answer: I am refusing to answer.

14 "Question: Did Mr. Youtt represent you at
15 the time of sentencing in connection with your plea
16 of guilty at the time of sentencing?

17 "Answer: I am refusing to answer that
18 question.

19 "Question: On what grounds?

20 "Answer: I am refusing to answer that ques-
21 tion.

22 "Question: You are refusing to answer ques-
23 tions concerning which grounds?

24 "Answer: No, I am refusing to answer the
25 previous question.

1 "THE FOREMAN: I will ask you to instruct
2 the witness to respond to that question.

3 "Question: I am advising you, sir, at this
4 time you have no right under the First Amendment
5 or Ninth to refuse to answer the question. I am
6 going to ask the Foreman to instruct you to answer
7 that question.

8 "THE FOREMAN: Mr. Sherman, you have been
9 granted immunity. Therefore you must answer all
10 questions that are put to you.

11 "Answer: I refuse to answer that question.

12 "Question: Would you like to have some time
13 to discuss this with your attorney?

14 "Answer: My attorney isn't here.

15 "Question: Mr. Foreman, I am going to contact
16 the Miscellaneous Judge for this bar to see if we
17 cannot get an order in connection with this matter.

18 "Question: Mr. Sherman, could I have the
19 telephone number of Mr. Youtt?

20 "Answer: 586-3722.

21 "Question: Mr. Sherman, I have Mr. Youtt
22 on the telephone at the present time. I have just
23 asked him if he advised you" --

24 THE COURT: These questions he refused to
25 answer?

1 MR. RICH'E: There are some further questions.

2 THE COURT: Keep going.

3 THE WITNESS: "I have just asked him
4 if he advised you to assert privilege in connection
5 with certain questions with Mr. Fisher. He stated
6 he did not so advise you. He would like to talk to
7 you at this time."

8 At that time the witness left the room to
9 talk on the telephone with his counsel.

10 "THE FOREMAN: You're still under oath.

11 "Question: Mr. Sherman, I ask you again who
12 paid Mr. Fisher the thousand dollars to represent
13 you.

14 "Answer: Once again I refuse to answer the
15 question.

16 "Question: On what grounds?

17 "Answer: The First Amendment and the Ninth
18 Amendment.

19 "Question: What part of the First Amendment?

20 "Answer: Freedom of association and right
21 to privacy.

22 "Question: You should use the Fourth
23 Amendment for right to privacy.

24 "Answer: I'm not a lawyer.

25 "Question: The Ninth Amendment does not deal

1 with that. The Fourth Amendment--

2 "Answer: If I were so smart I wouldn't be
3 here.

4 "A GRAND JUROR: Your lawyer didn't give you
5 the proper advice.

6 "Question: I will ask the foreman of the
7 grand jury to instruct Mr. Sherman to go to the
8 marshal in connection with this matter.

9 "THE FOREMAN: I ask you, sir, Mr. Sherman--

10 "Question: We will have to take a recess to
11 go before the judge in this matter."

12 MR. RICHIE: That's about it.

13 I would like the record to reflect on July
14 15th, 1974, Mr. Harold Fisher appeared as an attorney
15 for the defendant Michael Sherman at the time that
16 he was arraigned in front of Judge Orrin G. Judd in
17 connection with Indictment No. 73 CR 1068, which is
18 the indictment under which Forrest Jerry, with whom
19 your Honor is familiar, was indicted and convicted
20 in front of Judge Judd.

21 THE COURT: I direct you, Mr. Sherman, to
22 return to the grand jury and answer the following
23 questions:

24 "Who did you get the money from when referring
25 to how much money was paid to Mr. Fisher, namely,

1 the thousand dollars."

2 The question was "Who did you get the money
3 from to make that payment?"

4 Two: "Who gave you the \$1,000 to pay
5 Mr. Fisher?"

6 Three: "Who gave you the \$1,000 to pay
7 Mr. Fisher?"

8 Four: "Who gave you the money you gave to
9 Mr. Youtt?"

10 Five: "Did Mr. Youtt represent you at the
11 time of sentencing?"

12 Six: "Who paid Mr. Fisher a thousand dollars
13 to represent you?"

14 I direct you to answer each and every one of
15 those questions. If you persist in your refusal
16 to do so, you will leave the Court no alternative but
17 to hold you in contempt, and to deal with you
18 accordingly. You understand?

19 MR. SHERMAN: Yes, I do.

20 THE COURT: Bring the attorney back in.

21 (Mr. Youtt enters the courtroom.)

22 THE COURT: Mr. Youtt, I have advised and
23 instructed your client to answer six questions, two
24 of which are for practical purposes repetitive of
25 one another. It's five questions. I have advised

1 him that if he doesn't answer those questions when
2 he now returns to the grand jury, and he comes back
3 here without having answered those questions, I will
4 hold him in contempt and impose such punishment as
5 is warranted.

6 Do you wish to have an opportunity to confer
7 with him before he goes to the grand jury?

8 MR. YOUTT: I don't think it's necessary.
9 We discussed these areas before.

10 THE COURT: Take him away.

11 (Time noted: 3:17 p.m.)

12 ---

13 (Time noted: 3:50 p.m.)

14 THE COURT: Do you wish to put the foreman
15 or someone on the witness stand to ask him whether
16 he answered any of the questions?

17 MR. RICHIE: I will put Mr. Wilkinson on,
18 your Honor.

19
20 R A L P H W I L K I N S O N, called as a witness,
21 having been duly sworn by the Clerk of the Court,
22 testified as follows:

23 THE CLERK: Full name for the record.

24 THE WITNESS: Ralph Wilkinson, W-i-l-k-i-n-
25 s-o-n.

1
2 MR. RICHIE: Do you wish me to conduct the
3 examination, your Honor?

4 THE COURT: I'll ask him.

5 EXAMINATION

6 BY THE COURT:

7 Q You were here when I directed Mr. Sherman
8 to answer five or six questions, one of which was a dupli-
9 cate of a private one, the specific questions?

10 A I was.

11 Q Were those specific questions put to Mr. Sher-
12 man in the grand jury after that?

13 A They were.

14 Q Did the witness, Mr. Sherman, answer any of
15 those questions?

16 A No, sir, he refused to answer.

17 Q Did you instruct him, you, yourself, instruct
18 him as well as the U.S. Attorney, to answer each one of
19 them?

20 A I did, your Honor.

21 THE COURT: Mr. Sherman, you realize you
22 leave me no alternative?

23 MR. SHERMAN: Yes, your Honor, I understand.

24 THE COURT: I hold you in contempt and
25 pursuant to Title 28 U.S. Code Section 1826 it is

1 the judgment of this Court that you be committed
2 to the custody of the Attorney General of the United
3 States for imprisonment for a period of six months
4 or the term of the May 1972 grand jury, whichever is
5 shorter, and the statute reads, "The term of the
6 grand jury including extensions." During such period
7 you may purge yourself of contempt by answering the
8 questions that the Court directed you to answer, and
9 you may purge yourself of this sentence by so doing.

10 If you do wish to purge yourself of such con-
11 tempt, you should communicate with this Court or with
12 the United States Attorney and so inform him and you
13 will be brought back before the grand jury and given
14 an opportunity to purge yourself of the contempt.

15 MR. RICHIE: Does your Honor wish me to
16 prepare a contempt order?

17 THE COURT: Yes. The sole question remains
18 in my mind how long is your present sentence?

19 MR. SHERMAN: I was due to be paroled April
20 10th, your Honor.

21 THE COURT: You understand that this would be
22 called, of course, to the attention of your parole
23 board. It's up to you. You can purge yourself of
24 contempt by just coming back and answering the
25 questions; otherwise you'll serve six months or the

1 life of the grand jury, whichever is shorter.

2 MR. SHERMAN: Excuse me. I just wanted to
3 ask, is it possible I can serve that time at Allen-
4 wood, where I am presently designated?

5 THE COURT: The Court will not designate
6 where you're to serve the time. You will be put
7 in the custody of the Attorney General wherever he
8 wishes to incarcerate you.

9 MR. SHERMAN: I was presently designated there
10 on the previous sentence.

11 THE COURT: Is that a federal sentence?

12 MR. RICHIE: That is a federal sentence,
13 imposed by Judge Judd.

14 THE COURT: It's up to the Attorney General
15 where he wants to incarcerate him during the next
16 six months.

17 MR. SHERMAN: Thank you.

18 (Time noted: 3:50 p.m.)

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CONTEMPT ORDER OF PLATT, J.
DATED MARCH 24, 1975

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

IN RE MICHAEL SHERMAN, A WITNESS BEFORE
THE SPECIAL MAY, 1975 GRAND JURY

On this 24th day of March, 1975, this matter came to the attention of the Court upon the application of the United States of America by David J. Ritchie, Special Attorney, Department of Justice, for an order finding MICHAEL SHERMAN in direct contempt of court for his refusal to answer questions before the Special May, 1972 Grand Jury at Brooklyn, New York, on March 24, 1975. MICHAEL SHERMAN was present in person and with his attorney, Harry Youtt, New York, New York.

After hearing argument and being advised in the premises, the Court finds MICHAEL SHERMAN appeared before the Special May, 1972 Grand Jury sitting in Brooklyn, New York, on March 24, 1975; that MICHAEL SHERMAN refused to answer questions propounded by said Grand Jury after having been granted immunity from prosecution under Title 18, United States Code, Section 6003 and ordered to answer questions

CONTEMPT ORDER OF PLATT, J.
DATED MARCH 24, 1975

before the said Grand Jury pursuant to the order of Honorable Thomas C. Platt, United States District Judge, Eastern District of New York, of March 17, 1975 (upon application of David G. Trager, United States Attorney, Eastern District of New York); that MICHAEL SHERMAN is in direct contempt of the order of this Court and should be committed to the custody of the United States Marshal.

IT IS ORDERED, ADJUDGED AND DECREED that MICHAEL SHERMAN is in direct contempt of this court for his failure to answer questions before the said Grand Jury, and pursuant to Title 28, United States Code, Section 1826(a) he is hereby committed to the custody of the United States Marshal for the Eastern District of New York, for the life of the said Grand Jury, or six (6) months from the date of this Order, or until such time as he purges himself of this contempt, whichever of these three events shall occur first.

IT IS SO ORDERED.

Dated: Brooklyn, New York
March 24, 1975

s/ Thomas c. Platt
UNITED STATES DISTRICT JUDGE
EASTERN DISTRICT OF NEW YORK

DECISION OF THE UNITED STATES
DISTRICT COURT FOR THE EASTERN
DISTRICT OF NEW YORK DATED
May 27, 1975.

75C 846

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
In re: Grand Jury Investigation :

UNITED STATES OF AMERICA, :

Petitioner, :

v. :

MICHAEL SHERMAN, :

Respondent. :

MAY 27 1975

-----X
A p p e a r a n c e s :

David G. Trager, United States Attorney, E.D.N.Y., Gerald T. McGuire, by David J. Ritchie, Special Attorney, Dep't of Justice, for petitioner

Theodore S. Weiss, 250 Broadway, New York City 10007, for respondent

COSTANTINO, D.J.

The respondent has been granted immunity from prosecution, pursuant to authorization from Deputy Attorney General Lawrence H. Silberman and an order signed by Honorable Thomas C. Platt on March 17, 1975. He has continued, however, to refuse to answer questions posed to him by David J. Ritchie, Special Attorney of the Department of Justice, before a grand jury. The government has moved,

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MAY 27, 1975

pursuant to 28 U.S.C. § 1826(a), for an order adjudging Mr. Sherman in civil contempt, and Mr. Sherman has opposed that motion.

While serving a sentence of eighteen months imposed by the Honorable Orrin G. Judd of this court for two counts of sports bribery and conspiracy to commit sports bribery, Mr. Sherman was brought before the May 1972 Special Grand Jury. He refused to answer any questions, basing his refusal upon his Fifth Amendment privilege, and was thereafter granted immunity and ordered to testify. Although answering some questions, Mr. Sherman refused to answer questions concerning the identity of the person who had sent him the money to retain an attorney. He was cited for civil contempt and sentenced to serve a period of six months or until the life of the Grand Jury terminated, whichever first occurred.

On April 10, 1975 Mr. Sherman was released on parole from the Federal Correctional Facility at Allenwood, Pennsylvania despite the civil contempt citation, but voluntarily turned himself over to the federal authorities on April 11, 1975. At that time the government informed

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Mr. Sherman that it intended to put him before another Grand Jury - the May 1974 Special Grand Jury. After several adjournments, Mr. Sherman was directed to appear on May 5, 1975. Meanwhile, the May 1972 Special Grand Jury expired and Mr. Sherman was released on May 2, 1975.

On May 5, 1975 Mr. Sherman was brought before the May 1974 Special Grand Jury and asked the following four questions:

1. Who paid Mr. Youtt's fee at the time of sentencing on the Superfecta indictment?
2. Who paid your attorney fees to Mr. Fischer?
3. Now, directing your attention to March 20, 1973, on that day did you have occasion to speak with Marvin Proman concerning a race, a Superfecta race that night at Roosevelt Raceway involving Alan Canter on Hempstead Champ?
4. Isn't it a fact that you told Marvin Proman that if he got Alan Canter to finish out of the top four in that Superfecta race, that he would be given \$1,000 from you?

Mr. Ritchie explained to Mr. Sherman that the immunity previously ordered by Judge Platt on March 17 was still

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effective. Despite this, and explaining that he fully understood, Mr. Sherman continued to refuse to answer. Mr. Sherman, his attorney Theodore A. Weiss and Mr. Ritchie then appeared before the court and Mr. Sherman was directed to answer the questions. The court further advised Mr. Sherman that if he continued to refuse to answer, a hearing would be held to determine whether Mr. Sherman should be held in civil contempt. Upon returning to the Grand Jury, Mr. Sherman again refused to answer the first of the four questions previously propounded and stated that his refusal was directed at all four questions.

Mr. Sherman maintains that he should not be held in civil contempt of the Grand Jury for five reasons. First, he contends that Mr. Ritchie, the Special Attorney for the government, has received insufficient authority to appear before the Grand Jury and therefore any questions asked of Mr. Sherman are null and Mr. Sherman may not be punished for refusing to answer them. See United States v. Crispino, 74 Cr. 932 (S.D.N.Y. Feb. 13, 1975). This position has been rejected by the Second Circuit in United States v. Persico, 75-2030 (2d Cir., May 21, 1975). Accordingly, this court rejects Mr. Sherman's first objection.

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Mr. Sherman's second point is that the letter from Deputy Attorney General Silberman which authorized Mr. Ritchie to seek an order compelling Mr. Sherman to testify in return for immunity, referred only to the May 1972 Special Grand Jury. He contends the government must obtain another letter of authorization to seek an order of immunity for the May 1974 Special Grand Jury. The language of the letter, however, belies that interpretation. The letter authorizes the United States Attorney's office to apply "for an order or orders requiring Michael Sherman to give testimony or provide other information pursuant to 18 U.S.C. §§ 6002-6003 in the above matter and in any further proceedings resulting therefrom or ancillary thereto." (emphasis added) Accordingly, the letter is sufficient authorization to apply to the May 1974 Special Grand Jury.

Mr. Sherman asserts that he may have been the subject of electronic surveillance and that if he has, the government must demonstrate that its surveillance was legal. Gelbard v. United States, 408 U.S. 41 (1972); 18 U.S.C. § 2515. The government, through its Special Attorney Mr. Ritchie, has represented to the court that no electronic surveillances were made of Mr. Sherman. The court expects

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that the government will continue to attempt to ascertain whether there has been any electronic surveillance and, if any evidence is found, to supply that evidence to the court for an in camera inspection to insure that the evidence has been legally obtained. See In re Persico, 491 F.2d 1156 (2d Cir. 1974), cert. denied U.S. (1974).

Mr. Sherman's fourth contention is that he may not be held in civil contempt of the May 1974 Special Grand Jury because he has already served one civil contempt sentence for refusing to answer questions propounded on behalf of the May 1972 Special Grand Jury. He maintains that 28 U.S.C. § 1826(a)(2) limits the period of confinement to the term of the Grand Jury, but not to exceed eighteen months. Mr. Sherman, of course, is correct that section 1826 so limits the period of confinement for civil contempt. However, Mr. Sherman has been found in contempt of two separate grand juries. While the double punishment may seem onerous upon first impression, it must be noted that Mr. Sherman holds the key to the jailhouse in his hand. He may choose to comply with the order to testify at any time and relieve himself of the contempt citation. The powers of the grand jury would be severely circumscribed if a witness could

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refuse to testify before it after obtaining immunity without liability for contempt just because he had served a civil contempt sentence for refusing to answer questions about the same subject matter before a previous grand jury. Accordingly, this court holds that the fact that Mr. Sherman already has served one sentence for civil contempt is irrelevant to his current status as being in contempt.

Mr. Sherman's last objection is to the actual questions that were asked of him before the grand jury. He contends that requesting information concerning from whom he had obtained the funds to pay his attorney was an improper invasion upon the attorney-client privilege. It is doubtful that the attorney-client privilege would shield a client from having to disclose the financial arrangements with his attorney, United States v. Pape, 144 F.2d 778, 782-83 (2d Cir. 1944); Colton v. United States, 306 F.2d 633, 637-38 (2d Cir. 1962), cert. denied, 371 U.S. 951 (1963); In Re Michaelson, 511 F.2d 882 (9th Cir. 1975), cert. denied, 43 U.S.L.W. 3610 (U.S. May 19, 1975), but even if there were such a privilege, it appears to have been waived by the involvement of a third party. One response Mr. Sherman did give before the grand jury was that "a friend of mine lent me

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the money." Accordingly, the questions asked were not improper.

Mr. Sherman has requested that should this court reject his arguments and determine to hold him in civil contempt, a stay of execution of judgment be granted to permit an expeditious appeal. Section 1826(b) of Title 28 U.S.C. provides that a person confined under the section will not be admitted to bail "if it appears that the appeal is frivolous or taken for delay." An appeal of the determination of this court does not appear to be either frivolous or taken for reasons of delay. Accordingly, bail will be set at \$1000 pending the appeal if a notice of appeal is filed within the time required by the rules.

U. S. D. J.

CONTEMPT ORDER OF COSTANTINO, J.
DATED JUNE 2, 1975

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

IN RE: MICHAEL SHERMAN, A WITNESS
BEFORE THE SPECIAL MAY 1974 GRAND
JURY

On this 27th day of May, 1975, this matter comes on for the attention of the Court upon the application of the United States of America, by and through David J. Ritchie, Special Attorney, Department of Justice, for an order finding Michael Sherman in direct contempt of court for his refusal to answer questions before the Special May, 1974 Grand Jury at Brooklyn, New York, on May 12, 1975. Michael Sherman was present in person and with his attorney, Theodore S. Weiss, New York, New York.

After hearing argument and being advised in the premises, the Court finds that Michael Sherman appeared before the Special May, 1974 Grand Jury sitting in Brooklyn, New York on May 5, 1975; that Michael Sherman refused to answer questions propounded by said Grand Jury after having been granted immunity from prosecution under Title 18 United States Code, Section

CONTEMPT ORDER OF COSTANTINO, J.
DATED JUNE 2, 1975

6003 and ordered to answer questions before the said Grand Jury pursuant to the order of Honorable Thomas Platt, United States District Judge, Eastern District of New York, of March 17, 1975 (upon the application of David G. Trager, United States Attorney, Eastern District of New York); that Michael Sherman is in direct contempt of the order of this Court and should be committed to the custody of the United States Marshal.

IT IS ORDERED, ADJUDGED, AND DECREED that Michael Sherman is in direct contempt this Court for his failure to answer questions before the said Grand Jury and he is hereby committed to the custody of the United States Marshal for the Eastern District of New York, for the life of the Special May, 1974 Grand Jury, but not to exceed six months, or until such time as he purges himself of this contempt.

IT IS FURTHER ORDERED, that during the pendency of the witness's appeal, he shall be at large on \$1,000.00 personal recognizance bond.

IT IS SO ORDERED.

Brooklyn, N. Y.
6/2/75

s/ Mark A. Costantino
UNITED STATES DISTRICT JUDGE
EASTERN DISTRICT OF NEW YORK

NOTICE OF APPEAL DATED MAY 30, 1975

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - x

IN RE. MICHAEL SHERMAN	:	
UNITED STATES OF AMERICA,	:	INDEX NO.
Petitioner,	:	
- against -	:	NOTICE OF APPEAL
MICHAEL SHERMAN,	:	
Respondent.	:	

- - - - - x

Notice is hereby given that MICHAEL SHERMAN, Respondent above named, hereby appeals to the United States Court of Appeals for the Second Circuit from a judgment of the United States District Court, Eastern District of New York (Costantino, J.) adjudging the witness-respondent in Civil Contempt in violation of 28 USC 1826(a), entered in this action on the 27th day of May, 1975.

Yours, etc.

THEODORE S. WEISS
Attorney for Witness-Respondent
250 Broadway
New York, New York 10007
(212) WO-2-2800

Dated:
Brooklyn, New York
May 30, 1975

NOTICE OF APPEAL DATED MAY 30, 1975

To:

Clerk
United States District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Hon. David Trager
United States Attorney
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Federal Strike Force,
Eastern District of New York
35 Tillary Street
Brooklyn, New York

NOTICE OF APPEAL DATED JUNE 3, 1975

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - x
IN RE. MICHAEL SHERMAN :
UNITED STATES OF AMERICA, :
Petitioner, :
- against - :
MICHAEL SHERMAN, :
Respondent. :
- - - - - x

INDEX NO. 75C 8

NOTICE OF APPEAL

JUN 3 1 56 PM '75
U.S. DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Notice is hereby given that MICHAEL SHERMAN, Respondent above named, hereby appeals to the United States Court of Appeals for the Second Circuit from a judgment of the United States District Court, Eastern District of New York (Costantino, J.) adjudging the witness-respondent in Civil Contempt in violation of 28 USC 1826 (a), entered in this action on the 2nd day of June, 1975.

Yours, etc.,

THEODORE S. WEISS
Attorney for Witness-Respondent
250 Broadway
New York, NY 10007
(212) WO2-2800

Dated: Brooklyn, N.Y.
June 3, 1975

STATE OF NEW YORK
COUNTY OF NEW YORK

BARBARA WILLIAMSON being duly sworn deposes
and says: On JUNE 25, 1975 I served the
within record on appeal brief appendix on
REUBEN H. WALLACE, JR. the attorney for the APPELLEE
respondent by leaving mailing three copies thereof TO HIM
at his office located at 40 T. GEORGE GILINSKY
P.O. BOX 899, BEN FRANKLIN STATION
WASHINGTON D.C. 20044

Sworn to before me
this 25th day of

June, 1975

Theresa Corless

THERESA CORLESS
Notary Public, State of New York
No. 4518917
Qualified in Bronx County
Term Expires March 30, 1976